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Supreme Court of the United States

OCTOBER TERM, 1957

No. 396

HERBERT BROWNELL, JR., ATTORNEY GENERAL,
PETITIONER,

vs.

JIMMIE QUAN, ALSO KNOWN AS QUAN DUNG
NGOON, JOW MUN YGW, JOW KWONG YEONG,
ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petition for Certiorari

Filed August 23, 1957

Certiorari Granted October 28, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 396

HERBERT BROWNELL, JR., ATTORNEY GENERAL,
PETITIONER,

vs.

JIMMIE QUAN, ALSO KNOWN AS QUAN DUNG
NGOON, JOW MUN YOW, JOW KWONG YEONG,
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APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the District of Columbia Circuit	1	1
Joint appendix containing the proceedings in the United States District Court for the District of Columbia Circuit	1	1
Complaint in No. 12,772	1	1
Motion for preliminary injunction	3	3
Motion to dismiss	3	4
Order dismissing complaint	3	4
Complaint in No. 12,773	4	5
Motion for preliminary injunction	6	7
Motion to dismiss	6	7
Order dismissing complaint	7	8
Complaint in No. 12,774	7	8
Motion for preliminary injunction	9	10
Motion to dismiss	10	11
Order dismissing complaint	10	11
Complaint in No. 12,800	10	12
Motion for preliminary injunction	13	14
Motion to dismiss	13	14
Stipulation of facts	13	15
Order dismissing complaint	14	16
Opinion, Prettyman, J.	15	17
Judgment	19	21
Clerk's certificate (omitted in printing)	23	22
Order allowing certiorari	24	22

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,772

JIMMIE QUAN, AKA QUAN DUNG NGOON

No. 12,773

JOW MUN YOW AND JOW KWONG YEONG

No. 12,774

YEN MOK

No. 12,800

LAM WING

Appellants

v.

HERBERT BROWNELL, JR., Attorney General of the
United States, *Appellee*

JOINT APPENDIX

IN UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Complaint in No. 12,772—Filed June 27, 1955

The plaintiff, by his attorney, respectfully alleges:

1. That this is an action for a declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and for review under the Administrative Procedure Act (5 U.S.C. 1001 et seq.).
2. That the plaintiff is a citizen of China.
3. That the defendant is the Attorney General of the United States and is charged with the statutory duty to determine after appropriate hearings whether aliens are to be excluded and deported from the United States and super-

vises the administration of the Immigration and Naturalization Service.

4. That the plaintiff is not a permanent resident of the United States.

5. That the plaintiff last arrived in the United States on or about July 13, 1949, and sought admission to the United States, claiming American citizenship.

6. That thereafter plaintiff was paroled into the United States and has remained at large ever since.

7. That a final order was entered against the plaintiff on December 3, 1954, excluding him from the United States.

8. That the plaintiff filed an application under section 243(h) of the Immigration and Nationality Act of 1952, requesting that he not be deported to Communist China upon the ground that if he is sent there he will be subject to physical persecution. The plaintiff has also requested that his parole be continued under Section 212(d)(5) of the Immigration and Nationality Act, and both of the plaintiff's applications have been denied.

9. That the defendant has designated Communist China as the place to which the plaintiff shall be deported and is threatening to send the plaintiff to Communist China through Hong Kong.

10. That the plaintiff is opposed to Communism and the plaintiff is anti-communist.

11. That if deported to Communist China, the plaintiff will suffer physical persecution.

12. That the defendant has advised the plaintiff that his application claiming physical persecution will not be considered upon the ground that a claim of physical persecution may not be asserted in exclusion cases.

13. That the defendant, acting through his agents, has arbitrarily and contrary to law determined not to honor any claims of persecution made by Chinese aliens in exclusion cases and has arbitrarily and contrary to law refused to exercise discretion to permit the plaintiff to remain in the United States.

14. That the plaintiff is not subject to deportation to Communist China, but on the contrary is deportable only to Hong Kong which is the country from whence he came.

15. That the order directing the deportation of plaintiff to Communist China, through Hong Kong, is arbitrary, contrary to law, a gross abuse of discretion, and null and void.

16. That the deportation of the plaintiff to Communist China is a violation of the provisions of the Immigration and Nationality Act, and the regulations of the Immigration Service, and deprives the plaintiff of due process of law.

17. That the defendant has advised the plaintiff to be ready for deportation to Communist China on July 8, 1955, and unless restrained will deport the plaintiff to Communist China causing him irreparable injury.

WHEREFORE, plaintiff prays for a judgment:

(a) Declaring that he is not deportable to Communist China;

(b) Directing the defendant to consider his claim of physical persecution;

(c) Restraining the defendant from deporting plaintiff to Communist China;

(d) For such other and further relief as may be appropriate.

JACK WASSERMAN,
Attorney for Plaintiff,
Warner Building
Washington 4, D. C.

FALLON & HARGREAVES,
Of Counsel.

3 IN UNITED STATES DISTRICT COURT

Motion for Preliminary Injunction—Filed June 28, 1955

The plaintiff, Jimmie Quan, by his attorneys moves the Court for an order granting a preliminary injunction against the defendant, restraining defendant from appre-

hending and deporting the plaintiff pending determination of this suit and until further order of the Court, upon the grounds and in accordance with the prayers set forth in the complaint and other papers filed herein.

JACK WASSERMAN,
Attorney for Plaintiff.

(Attached affidavit omitted in printing)

IN UNITED STATES DISTRICT COURT

Motion to Dismiss—Filed July 1, 1955

Comes now the defendant and by his attorney, the United States Attorney, moves this honorable Court to dismiss the complaint filed herein on the grounds that the Court lacks jurisdiction over the subject matter, the complaint fails to state a claim upon which relief may be granted, and fails to comply with the provisions of Rule 8(a), Federal Rules of Civil Procedure in that it does not contain a short and plain statement of the claim showing that the pleader is entitled to relief.

LEO A. ROVER,
United States Attorney.

IN UNITED STATES DISTRICT COURT

Order Dismissing Complaint—Filed July 1, 1955

This cause having come on for hearing on plaintiff's motion for a preliminary injunction and the defendant having filed a motion to dismiss the complaint herein, the same having been filed with the consent of attorney for the plaintiffs and on order of the Court, and both motions having been argued and the Court having found that it is without jurisdiction of the subject matter and that the complaint fails to state a claim upon which relief may be granted, it is this 1st day of July, 1955,

ORDERED that the complaint herein be and the same is hereby dismissed and the motion for preliminary injunction be and the same is hereby denied, and it is

FURTHER ORDERED that plaintiff's oral application for a stay pending appeal be and is hereby denied.

RICHMOND B. KEECH,
Judge.

IN UNITED STATES DISTRICT COURT

Complaint in No. 12,773—Filed June 28, 1955

The plaintiffs, by their attorneys, respectfully allege:

1. That this is an action for a declaratory judgment under the Declaratory Judgment Act (28 U. S. C. 2201) and for review under the Administrative Procedure Act (5 U. S. C. 1001 et seq).
2. That the plaintiffs are natives and citizens of China.
3. That the defendant is the Attorney General of the United States and is charged with the statutory duty to determine, after appropriate hearings, whether aliens are to be excluded or deported from the United States and supervises the administration of the Immigration and Naturalization Service.
4. That the plaintiffs are not permanent residents of the United States.
5. That the plaintiffs arrived in the United States on or about October 21, 1951, and sought admission to the United States claiming American citizenship.
6. That on July 22, 1952, the plaintiffs were paroled into the United States pending final determination of their claims to American citizenship.
7. That on August 14, 1953, final orders were entered in the plaintiffs' case excluding them from the United States.
8. That from July 22, 1952, until the present date, the plaintiffs have been at large on parole.
9. That the plaintiffs filed applications under Section 243(h) of the Immigration and Nationality Act of

5. 1952, requesting that they be not deported to Communist China upon the ground that if they are sent there they will be subject to physical persecution.

10. That the defendant has designed Communist China as the place to which the plaintiffs shall be deported and is threatening to send the plaintiffs to Communist China through Hong Kong.

11. That the plaintiffs are opposed to Communism and the plaintiffs are anti-communist.

12. That if deported to Communist China, the plaintiffs will suffer physical persecution.

13. That the defendant has advised the plaintiffs that their applications claiming physical persecution will not be considered upon the ground that claims of physical persecution may not be asserted in exclusion cases.

14. That the defendant, acting through his agents, has arbitrarily and contrary to law determined not to honor any claims of persecution made by Chinese aliens in exclusion cases and has arbitrarily and contrary to law refused to exercise discretion to permit the plaintiffs to remain in the United States.

15. That the plaintiffs are not subject to deportation to Communist China.

16. That the order directing the deportation of plaintiffs to Communist China, through Hong Kong, is arbitrary, contrary to law, a gross abuse of discretion, and null and void.

17. That the deportation of the plaintiffs to Communist China is a violation of the provisions of the Immigration and Nationality Act, and the regulations of the Immigration Service, and deprives the plaintiffs of due process of law.

18. That the defendant has advised the plaintiffs to be ready for deportation to Communist China on July 8, 1955, and unless restrained will deport the plaintiffs to Communist China causing them irreparable injury.

WHEREFORE, plaintiffs pray for a judgment:

(a) Declaring that they are not deportable to Communist China; *

6. (b) Directing the defendant to consider their claims of physical persecution;

(c) Restraining the defendant from deporting plaintiffs to Communist China;

(d) For such other and further relief as may be appropriate.

JACK WASSERMAN,
Attorney for Plaintiff,
Warner Bldg.,
Washington 4, D. C.

GARCIA & WONG,
Of Counsel.

IN UNITED STATES DISTRICT COURT

Motion for Preliminary Injunction—Filed June 28, 1955

The plaintiffs, Jow Mun Yow and Jow Kwong Yeong, by their attorneys move the Court for an order granting a preliminary injunction against the defendant, restraining defendant from apprehending and deporting plaintiffs pending determination of this suit and until further order of the Court, upon the grounds and in accordance with the prayers set forth in the complaint and other papers filed herein.

JACK WASSERMAN,
Attorney for Plaintiff.

(Attached Affidavit omitted in printing)

IN UNITED STATES DISTRICT COURT

Motion to Dismiss—Filed July 1, 1955

Comes now the defendant and by his attorney, the United States Attorney, moves this honorable Court to dismiss the complaint filed herein on the grounds that the Court lacks jurisdiction over the subject matter, the complaint

fails to state a claim upon which relief may be granted, and fails to comply with the provisions of Rule 8(a), Federal Rules of Civil Procedure in that it does not contain a short and plain statement of the claim showing that the pleader is entitled to relief.

LEO A. ROVER,
United States Attorney.

IN UNITED STATES DISTRICT COURT

Order Dismissing Complaint—Filed July 1, 1955

This cause, having come on for hearing on plaintiffs' motion for a preliminary injunction and the defendant having filed a motion to dismiss the complaint herein, together with a memorandum of points and authorities in support thereof, the same having been filed with the consent of attorney for the plaintiffs and on order of the Court, and both motions having been argued and the Court having found that it is without jurisdiction of the subject matter and that the complaint fails to state a claim upon which relief may be granted, it is this 1st day of July, 1955.

ORDERED that the complaint herein be and the same is hereby dismissed and the motion for preliminary injunction be and the same is hereby denied, and it is

FURTHER ORDERED that plaintiffs' oral application for a stay pending appeal be and is hereby denied.

RICHMOND B. KEECH,
Judge.

IN UNITED STATES DISTRICT COURT

Complaint in No. 12,774—Filed July 1, 1955

The plaintiff, by his attorneys, respectfully alleges: 2

1. That this is an action for a declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and for review under the Administrative Procedure Act (5 U.S.C. 1001 et seq.).

2. That the plaintiff is a native and citizen of China.
3. That the defendant is the Attorney General of the United States and is charged with the statutory duty to determine, after appropriate hearings, whether
8. aliens are to be excluded or deported from the United States and supervises the administration of the Immigration and Naturalization Service.
4. That the plaintiff is not a permanent resident of the United States.
5. That the plaintiff arrived in the United States in December of 1954, and thereafter was paroled into the United States.
6. That on May 23, 1955, a final order was entered in the plaintiff's case excluding him from the United States.
7. That the plaintiff filed an application under Section 243(h) of the Immigration and Nationality Act of 1952, requesting that he not be deported to Communist China upon the ground that if he is sent there, he will be subject to physical persecution.
8. That the defendant has designated Communist China as the place to which the plaintiff shall be deported and is threatening to send the plaintiff to Communist China through Hong Kong.
9. That the plaintiff is opposed to Communism and the plaintiff is an anti-communist.
10. That if deported to Communist China, the plaintiff will suffer physical persecution.
11. That the defendant has advised the plaintiff that his application claiming physical persecution will not be considered upon the ground that claims of physical persecution may not be asserted in exclusion cases.
12. That the defendant, acting through his agents, has arbitrarily and contrary to law determined not to honor any claims of persecution made by Chinese aliens in exclusion cases and has arbitrarily and contrary to law refused to exercise discretion to permit the plaintiff to remain in the United States.

13. That the plaintiff is not subject to deportation to Communist China.

14. That the order directing the deportation of the plaintiff to Communist China, through Hong Kong, is arbitrary, contrary to law, a gross abuse of discretion, and null and void.

15. That the deportation of the plaintiff to Communist China is a violation of the provisions of the Immigration and Nationality Act, and the regulations of the Immigration Service, and deprives the plaintiff of due process of law.

16. That the defendant has advised the plaintiff to be ready for deportation to Communist China on July 6, 1955, and unless restrained will deport the plaintiff to Communist China causing him irreparable injury.

WHEREFORE, plaintiff prays for a judgment:

(a) Declaring that he is not deportable to Communist China;

(b) Directing the defendant to consider his claim of physical persecution;

(c) Restraining the defendant from deporting the plaintiff to Communist China;

(d) For such other and further relief as may be appropriate.

JACK WASSERMAN,

Attorney for Plaintiff,

902 Warner Building,

Washington 4, D. C.

ANDREW REINER,
Of Counsel.

IN UNITED STATES DISTRICT COURT

Motion for Preliminary Injunction—Filed July 1, 1955

The plaintiff, Yen Mok, by his attorneys, moves the Court for an order granting a preliminary injunction against the defendant, restraining defendant from apprehending and deporting plaintiff pending determination of this suit and until further order of the Court, upon the

grounds and in accordance with the prayers set forth in the complaint and other papers filed herein.

JACK WASSERMAN,
Attorney for Plaintiff.

(Attached affidavit omitted in printing)

10 IN UNITED STATES DISTRICT COURT

Motion to Dismiss—Filed July 1, 1955

Comes now the defendant and by his attorney, the United States Attorney, moves this honorable Court to dismiss the complaint filed herein on the grounds that the Court lacks jurisdiction over the subject matter, the complaint fails to state a claim upon which relief may be granted, and fails to comply with the provisions of Rule 8(a), Federal Rules of Civil Procedure in that it does not contain a short and plain statement of the claim showing that the pleader is entitled to relief.

LEO A. ROVER,
United States Attorney.

IN UNITED STATES DISTRICT COURT

Order Dismissing Complaint—Filed July 1, 1955

This cause having come on for hearing on plaintiff's motion for a preliminary injunction and the defendant having filed a motion to dismiss the complaint herein, the same having been filed with the consent of attorney for the plaintiff and on order of the Court, and both motions having been argued and the Court having found that it is without jurisdiction of the subject matter and that the complaint fails to state a claim upon which relief may be granted, it is this 1st day of July, 1955,

ORDERED that the complaint herein be and the same is hereby dismissed and the motion for preliminary injunction be and the same is hereby denied, and it is

FURTHER ORDERED that plaintiff's oral application for a stay pending appeal be and is hereby denied.

RICHMOND B. KEECH,
Judge.

IN UNITED STATES DISTRICT COURT

Complaint—Filed July 6, 1955

The plaintiff by his attorneys, respectfully alleges:

1. That this is an action for a declaratory judgment under the Declaratory Judgment Act (28 U. S. C. 2201) and for review under the Administrative Procedure Act (5 U.S.C. 1001 et seq).

2. That the plaintiff is a native and citizen of China.

3. That the defendant is the Attorney General of the United States and is charged with the statutory duty to determine, after appropriate hearings, whether aliens are to be excluded or deported from the United States and supervises the administration of the Immigration and Naturalization Service.

4. That the plaintiff is not a permanent resident of the United States.

5. That the plaintiff arrived in the United States originally in 1943 as a seaman. He thereafter followed his calling as a seaman from 1943 to 1945 on American vessels and received a presidential citation during World War II.

6. Plaintiff last arrived in the United States on April 17, 1952, and was ordered excluded and thereafter paroled into the United States.

7. Plaintiff filed an application under Section 243(h) of the Immigration and Nationality Act of 1952, requesting that he not be deported to Communist China upon the ground that if he is sent there he will be subject to physical persecution.

8. That the defendant has designated Communist China as the place to which the plaintiff shall be deported and is

threatening to send the plaintiff to Communist China through Hong Kong.

9. That the plaintiff is opposed to Communism and the plaintiff is anti-communist.

10. That if deported to Communist China, the plaintiff will suffer physical persecution.

11. That the defendant has advised the plaintiff that his application claiming physical persecution will not be considered upon the ground that claims of physical persecution may not be asserted in exclusion cases.

12. That the defendant, acting through his agents, has arbitrarily and contrary to law determined not to honor any claims of persecution made by Chinese aliens in exclusion cases and has arbitrarily and contrary to law refused to exercise discretion to permit the plaintiff to remain in the United States.

13. That the plaintiff is not subject to deportation to Communist China.

14. That the order directing the deportation of the plaintiff to Communist China, through Hong Kong, is arbitrary, contrary to law, a gross abuse of discretion, and null and void.

15. That the deportation of the plaintiff to Communist China is a violation of the provisions of the Immigration and Nationality Act, and the regulations of the Immigration Service, and deprives the plaintiff of due process of law.

16. That the defendant has advised the plaintiff to be ready for deportation to Communist China on July 6, 1955, and unless restrained will deport the plaintiff to Communist China causing him irreparable injury.

WHEREFORE, plaintiff prays for a judgment:

(a) Declaring that he is not deportable to Communist China;

(b) Directing the defendant to consider his claim of physical persecution;

(c) Restraining the defendant from deporting the plaintiff to Communist China;

(d) For such other and further relief as may be appropriate.

JACK WASSERMAN,
Attorney for Plaintiff,
Warner Building,
Washington 4, D. C.

DAVID CARLINER,
Attorney for Plaintiff,
Warner Building,
Washington 4, D. C.

ABRAHAM LEBENKOFF,
Of Counsel.

13. IN UNITED STATES DISTRICT COURT

Motion for Preliminary Injunction—Filed July 6, 1955

The plaintiff, Lam Wing, by his attorneys moves the Court for an order granting a preliminary injunction against the defendant, restraining defendant from apprehending and deporting the plaintiff pending determination of this suit and until further order of the Court, upon the grounds and in accordance with the prayers set forth in the complaint and other papers filed herein.

JACK WASSERMAN,
Attorney for Plaintiff.

(Attached affidavit omitted in printing)

IN UNITED STATES DISTRICT COURT

Motion to Dismiss—Filed July 6, 1955

Comes now the defendant and, by his attorney, the United States Attorney, moves this honorable Court to dismiss the complaint filed herein on the grounds that the Court lacks jurisdiction over the subject matter, the complaint fails to state a claim upon which relief may be granted, and fails to

comply with the provisions of Rule 8(a), Federal Rules of Civil Procedure, in that it does not contain a short and plain statement of the claim showing that the pleader is entitled to relief.

LEO A. ROVER,
United States Attorney.

IN UNITED STATES DISTRICT COURT

Stipulation of Facts—Filed July 6, 1955

It is hereby stipulated by and between the attorneys for the parties hereto that the plaintiff is an alien, a native and citizen of China, who last entered the United States at Baltimore, Maryland on April 17, 1952. On that date he was ordered detained on board as a "male fide" seaman by the immigration authorities, and thus ordered excluded from the United States. He was subsequently paroled
14 into the United States under bond and his case re-examined at New York on May 23, 1952, at which time it was concluded that the evidence sustained the exclusion order of April 17, 1952 and that order remained in effect.

On June 20, 1955 plaintiff submitted an application pursuant to Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253 (h), to have his deportation withheld on the ground that he would be subject to physical persecution if returned to China. The immigration authorities, to which the application was submitted, advised the plaintiff that they would not consider the application on the ground that as a matter of law such relief was not available to an alien ordered excluded from the United States.

(S.) DAVID CARLINER,
Attorney for Plaintiff.

(S.) WILLIAM F. BECKER,
*Assistant
United States Attorney.*

(S.) WILLIAM B. TAFFET,
*Special Assistant to the
United States Attorney.*

IN UNITED STATES DISTRICT COURT

Order Dismissing Complaint—Filed July 6, 1955

This cause having come on for hearing on plaintiff's motion for a preliminary injunction and the defendant having filed a motion to dismiss the complaint herein, the same having been filed with the consent of attorney for the plaintiff and on order of the Court, and both motions having been argued and the Court having found that it is without jurisdiction of the subject matter and that the complaint fails to state a claim upon which relief may be granted, it is this 6th day of July, 1955,

ORDERED that the complaint herein be and the same is hereby dismissed and the motion for preliminary injunction be and the same is hereby denied, and it is

FURTHER ORDERED that plaintiff's oral application for a stay pending appeal be and is hereby denied.

RICHMOND B. KEECH,
Judge.

15 IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12772

JIMMIE QUAN, a/k/a QUAN DUNG NGOON, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

No. 12773

JOW MUN YOW and JOW KWONG YEONG, APPELLANTS

v.

HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

No. 12774

YEN MOK, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

No. 12800

LAM WING, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

Appeals from the United States District Court
for the District of Columbia

Opinion—June 27, 1957

Mr. David Carliner, with whom *Mr. Jack Wasserman*
was on the brief, for appellants.

16 *Mr. John W. Kern, III*, Assistant United States
Attorney, with whom *Mr. Oliver Gasch*, United States
Attorney, and *Mr. Lewis Carroll*, Assistant United
States Attorney, were on the brief, for appellee.

Before PRETTYMAN, FAHY and BURGER, Circuit Judges.

PRETTYMAN, *Circuit Judge*: These are four appeals from judgments of the District Court dismissing complaints in civil actions. The actions were brought by natives of China who arrived in the United States at various dates seeking admission. They were paroled into the United States in exclusion proceedings. Thereafter they were ordered excluded and deported to the place whence they came, which was Hong Kong.¹ They claim that deportation to Hong Kong is in fact deportation to Communist China and that if sent there they will be subject to physical persecution. They seek the benefit of Section 243(h) of the Immigration and Nationality Act of 1952,² which provides:

"The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

The Government says the appellants are not "within the United States" and therefore the Attorney General has no power under the statute to withhold their deportation. The question before us is whether he has that power. We are not concerned with how he should exercise the power if he has it. We have to decide merely whether he has it.

Section 212(d)(5) of the 1952 Act³ provides in pertinent part:

17 "The Attorney General may in his discretion *parole into the United States* temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien * * *." (Emphasis ours.)

¹ Appellant Lam Wing was paroled after an initial exclusion order.

² 66 STAT. 214, 8 U.S.C.A. § 1253(h).

³ 66 STAT. 188, 8 U.S.C.A. § 1182(d)(5).

Thus it is clear that under the Act an alien may be paroled *into* the United States as well as admitted to it. In either event, he is, in the statutory terms, in the United States. We think an alien paroled into the United States within the meaning of Section 212(d)(5)⁴ is within the United States within the meaning of Section 243(h). Therefore as to him the Attorney General has a discretionary power to withhold deportation.

The Attorney General argues that there is a difference between excluding an alien and deporting him and that these aliens are to be excluded. But the very sentence of the statute which provides for excluding aliens⁵ uses the word "deported". The concluding clause in that sentence is "shall be allowed to enter or shall be excluded and deported." And the sentence which provides for the return of excluded aliens on the vessel bringing them uses the words "deported" and "deportation".⁶ The basic sentence is: "Any alien * * * who is excluded * * * shall be immediately deported * * *." And the proviso in that sentence is "unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper." The 18 regulations reflect the same idea. For example, Section 237.1, Title 8, Code of Federal Regulations (1952) speaks of "The immediate deportation of an excluded alien". The distinction relevant to Section 243 is between aliens who are, legally speaking, in the United States, by entry or parole, and those who, legally speaking, are not within the borders.

That the predecessor section to Section 243(h) of the 1952 Act, which was Section 23 of the 1950 Act,⁷ applied to an alien who was excluded was settled by *Ng Lin Chong v. McGrath*.⁸ Section 243(a) of the 1952 Act applies to

⁴ The Act contains a number of provisions relating to aliens within the United States. See Sec. 237(a), 66 STAT. 201, 8 U.S.C.A. § 1227(a); Sec. 237(b), 66 STAT. 201, 8 U.S.C.A. § 1227(b); Sec. 262, 66 STAT. 224, 8 U.S.C.A. § 1302; Sec. 265, 66 STAT. 225, 8 U.S.C.A. § 1305; Sec. 360(a), 66 STAT. 273, 8 U.S.C.A. § 1503(a).

⁵ Sec. 236(a), 66 STAT. 200, 8 U.S.C.A. § 1226(a).

⁶ Sec. 237(a), 66 STAT. 201, 8 U.S.C.A. § 1227(a).

⁷ 64 STAT. 1010.

⁸ 91 U.S. App. D.C. 131, 202 F. 2d 316 (D.C. Cir. 1952).

aliens "in the United States". We think that section gives the Attorney General discretion in respect to the country to which he will order aliens deported, whether they are legally in the United States by entry or by parole.

The cases will be remanded to the District Court with instructions to enter declaratory judgments in accord with this opinion.

19 IN UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,772

JIMMIE QUAN, a/k/a QUAN DUNG NGOON, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

No. 12,773

JOW MUN YOW and JOW KWONG YEONG, APPELLANTS

v.

HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

No. 12,774

YEN MOK, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

No. 12,800

LAM WING, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

Appeals from the United States District Court
for the District of Columbia

Before PRETTYMAN, FAHY and BURGER, Circuit Judges.

Judgment—June 27, 1957

These cases came on to be heard on the records from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgments of the said District Court appealed from in these cases be, and they are hereby, reversed, and that these cases be, and they are hereby, remanded to the said District Court with instructions to enter declaratory judgments in accord with the opinion of this Court. 3

Dated: June 27, 1957.

Per Circuit Judge PRETTYMAN.

23 Clerk's Certificate to foregoing Transcript
Omitted in Printing

24 SUPREME COURT OF THE UNITED STATES
(Title Omitted)

Order Allowing Certiorari—October 28, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 105, which case is likewise transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 396

Office - Supreme Court

FILED

AUG 23 1951

JOHN T. FEY, C

APPELLANTS' BRIEF AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,772

JIMMIE QUAN, AKA QUAN DUNG NGOON

No. 12,773

JOW MUN YOW AND JOW KWONG YEONG

No. 12,774

YEN MOK

No. 12,800

LAM WING

v.

Appellants

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF
THE UNITED STATES,

Appellee

BRIEF FOR APPELLANTS

JACK WASSERMAN,

DAVID CARLINER,

Attorneys for Appellants,

903 Warner Building of Appeals
United States Court of Appeals
Washington, D. C.

District of Columbia Circuit

ANDREW REINER,

GARCIA AND WONG,

FALLON AND HARGREAVES,

ABRAHAM LEBENKOFF,

Of Counsel.

FILED

MAR 29 1957

Joyce W. Stewart
CLERK

No. 12,772

COMPLAINT

Filed June 27, 1955

The plaintiff, by his attorney, respectfully alleges:

1. That this is an action for a declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and for review under the Administrative Procedure Act (5 U.S.C. 1001 et seq.).

2. That the plaintiff is a citizen of China.

3. That the defendant is the Attorney General of the United States and is charged with the statutory duty to determine after appropriate hearings whether aliens are to be excluded and deported from the United States and supervises the administration of the Immigration and Naturalization Service.

4. That the plaintiff is not a permanent resident of the United States.

5. That the plaintiff last arrived in the United States on or about July 13, 1949, and sought admission to the United States, claiming American citizenship.

6. That thereafter plaintiff was paroled into the United States and has remained at large ever since.

7. That a final order was entered against the plaintiff on December 3, 1954, excluding him from the United States.

8. That the plaintiff filed an application under section 243(h) of the Immigration and Nationality Act of 1952, requesting that he not be deported to Communist China upon the ground that if he is sent there he will be subject to physical persecution. The plaintiff has also requested that his parole be continued under Section 212(d)(5) of the Immigration and Nationality Act, and both of the plaintiff's applications have been denied.

9. That the defendant has designated Communist China as the place to which the plaintiff shall be deported and is threatening to send the plaintiff to Communist China through Hong Kong.

10. That the plaintiff is opposed to Communism and the plaintiff is anti-communist.

11. That if deported to Communist China, the plaintiff will suffer physical persecution.

12. That the defendant has advised the plaintiff that his application claiming physical persecution will not be considered upon the ground that a claim of physical persecution may not be asserted in exclusion cases.

13. That the defendant, acting through his agents, has arbitrarily and contrary to law determined not to honor any claims of persecution made by Chinese aliens in exclusion cases and has arbitrarily and contrary to law refused to exercise discretion to permit the plaintiff to remain in the United States.

14. That the plaintiff is not subject to deportation to Communist China, but on the contrary is deportable only to Hong Kong which is the country from whence he came.

15. That the order directing the deportation of plaintiff to Communist China, through Hong Kong, is arbitrary, contrary to law, a gross abuse of discretion, and null and void.

16. That the deportation of the plaintiff to Communist China is a violation of the provisions of the Immigration and Nationality Act, and the regulations of the Immigration Service; and deprives the plaintiff of due process of law.

17. That the defendant has advised the plaintiff to be ready for deportation to Communist China on July 8, 1955, and unless restrained will deport the plaintiff to Communist China causing him irreparable injury.

WHEREFORE, plaintiff prays for a judgment:

(a) Declaring that he is not deportable to Communist China;

(b) Directing the defendant to consider his claim of physical persecution;

(c) Restraining the defendant from deporting plaintiff to Communist China;

(d) For such other and farther relief as may be appropriate.

JACK WASSERMAN,
Attorney for Plaintiff,

*Warner Building,
Washington 4, D. C.*

FALLON & HARGREAVES,
Of Counsel.

MOTION FOR PRELIMINARY INJUNCTION

Filed June 28, 1955

The plaintiff, Jimmie Quan, by his attorneys moves the Court for an order granting a preliminary injunction against the defendant, restraining defendant from apprehending and deporting the plaintiff pending determination of this suit and until further order of the Court, upon the grounds and in accordance with the prayers set forth in the complaint and other papers filed herein.

JACK WASSERMAN,
Attorney for Plaintiff.

(Attached affidavit omitted in printing)

MOTION TO DISMISS

Filed July 1, 1955

Comes now the defendant and by his attorney, the United States Attorney, moves this honorable Court to dismiss the complaint filed herein on the grounds that the Court lacks jurisdiction over the subject matter, the complaint fails to state a claim upon which relief may be granted, and fails to comply with the provisions of Rule 8(a), Federal Rules of Civil Procedure in that it does not contain a short and plain statement of the claim showing that the pleader is entitled to relief.

LEO A. ROVER,
United States Attorney.

ORDER

Filed July 1, 1955

This cause having come on for hearing on plaintiff's motion for a preliminary injunction and the defendant having filed a motion to dismiss the complaint herein, the same having been filed with the consent of attorney for the plaintiffs and on order of the Court, and both motions having been argued and the Court having found that it is without jurisdiction of the subject matter and that the complaint

fails to state a claim upon which relief may be granted, it is this 1st day of July, 1955;

ORDERED that the complaint herein be and the same is hereby dismissed and the motion for preliminary injunction be and the same is hereby denied, and it is

FURTHER ORDERED that plaintiff's oral application for a stay pending appeal be and is hereby denied.

RICHMOND B. KEECH,

Judge.

No. 12,773

COMPLAINT

Filed June 28, 1955

The plaintiffs, by their attorneys, respectfully allege:

1. That this is an action for a declaratory judgment under the Declaratory Judgment Act (28 U. S. C. 2201) and for review under the Administrative Procedure Act (5 U. S. C. 1001 et seq).

2. That the plaintiffs are natives and citizens of China.

3. That the defendant is the Attorney General of the United States and is charged with the statutory duty to determine, after appropriate hearings, whether aliens are to be excluded or deported from the United States and supervises the administration of the Immigration and Naturalization Service.

4. That the plaintiffs are not permanent residents of the United States.

5. That the plaintiffs arrived in the United States on or about October 21, 1951, and sought admission to the United States claiming American citizenship.

6. That on July 22, 1952, the plaintiffs were paroled into the United States pending final determination of their claims to American citizenship.

7. That on August 14, 1953, final orders were entered in the plaintiffs' case excluding them from the United States.

8. That from July 22, 1952, until the present date, the plaintiffs have been at large on parole.

9. That the plaintiffs filed applications under Section 243(h) of the Immigration and Nationality Act of 1952.

requesting that they be not deported to Communist China upon the ground that if they are sent there they will be subject to physical persecution.

10. That the defendant has designed Communist China as the place to which the plaintiffs shall be deported and is threatening to send the plaintiffs to Communist China through Hong Kong.

11. That the plaintiffs are opposed to Communism and the plaintiffs are anti-communist.

12. That if deported to Communist China, the plaintiffs will suffer physical persecution.

13. That the defendant has advised the plaintiffs that their applications claiming physical persecution will not be considered upon the ground that claims of physical persecution may not be asserted in exclusion cases.

14. That the defendant, acting through his agents, has arbitrarily and contrary to law determined not to honor any claims of persecution made by Chinese aliens in exclusion cases and has arbitrarily and contrary to law refused to exercise discretion to permit the plaintiffs to remain in the United States.

15. That the plaintiffs are not subject to deportation to Communist China.

16. That the order directing the deportation of plaintiffs to Communist China, through Hong Kong is arbitrary, contrary to law, a gross abuse of discretion, and null and void.

17. That the deportation of the plaintiffs to Communist China is a violation of the provisions of the Immigration and Nationality Act, and the regulations of the Immigration Service, and deprives the plaintiffs of due process of law.

18. That the defendant has advised the plaintiffs to be ready for deportation to Communist China on July 8, 1955, and unless restrained will deport the plaintiffs to Communist China causing them irreparable injury.

WHEREFORE, plaintiffs pray for a judgment:

(a) Declaring that they are not deportable to Communist China;

(b) Directing the defendant to consider their claims of physical persecution;

(c) Restraining the defendant from deporting plaintiffs to Communist China;

(d) For such other and further relief as may be appropriate.

JACK WASSERMAN,
Attorney for Plaintiff,
Warner Bldg.,
Washington 4, D. C.

GARCIA & WONG
Of Counsel.

MOTION FOR PRELIMINARY INJUNCTION

Filed June 28, 1955

The plaintiffs, Jow Mun Yow and Jow Kwong Yeong, by their attorneys move the Court for an order granting a preliminary injunction against the defendant, restraining defendant from apprehending and deporting plaintiffs pending determination of this suit and until further order of the Court, upon the grounds and in accordance with the prayers set forth in the complaint and other papers filed herein:

JACK WASSERMAN,
Attorney for Plaintiff.

(Attached Affidavit omitted in printing)

MOTION TO DISMISS

Filed July 1, 1955

Comes now the defendant and by his attorney, the United States Attorney, moves this honorable Court to dismiss the complaint filed herein on the grounds that the Court lacks jurisdiction over the subject matter, the complaint fails to state a claim upon which relief may be granted, and fails to comply with the provisions of Rule 8(a), Fed-

eral Rules of Civil Procedure in that it does not contain a short and plain statement of the claim showing that the pleader is entitled to relief.

LEO A. ROVER,
United States Attorney.

ORDER

Filed July 1, 1955

This cause having come on for hearing on plaintiffs' motion for a preliminary injunction and the defendant having filed a motion to dismiss the complaint herein, together with a memorandum of points and authorities in support thereof, the same having been filed with the consent of attorney for the plaintiffs and on order of the Court, and both motions having been argued and the Court having found that it is without jurisdiction of the subject matter and that the complaint fails to state a claim upon which relief may be granted, it is this 1st day of July, 1955.

ORDERED that the complaint herein be and the same is hereby dismissed and the motion for preliminary injunction be and the same is hereby denied, and it is

FURTHER ORDERED that plaintiffs' oral application for a stay pending appeal be and is hereby denied.

RICHMOND B. KEECH,

Judge.

No. 12,774

COMPLAINT

Filed July 1, 1955

The plaintiff, by his attorneys, respectfully alleges:

1. That this is an action for a declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and for review under the Administrative Procedure Act (5 U.S.C. 1001 et seq.).

2. That the plaintiff is a native and citizen of China.

3. That the defendant is the Attorney General of the United States and is charged with the statutory duty to determine, after appropriate hearings, whether aliens are

to be excluded or deported from the United States and supervises the administration of the Immigration and Naturalization Service.

4. That the plaintiff is not a permanent resident of the United States.

5. That the plaintiff arrived in the United States in December of 1954, and thereafter was paroled into the United States.

6. That on May 23, 1955, a final order was entered in the plaintiff's case excluding him from the United States.

7. That the plaintiff filed an application under Section 243(h) of the Immigration and Nationality Act of 1952, requesting that he not be deported to Communist China upon the ground that if he is sent there, he will be subject to physical persecution.

8. That the defendant has designated Communist China as the place to which the plaintiff shall be deported and is threatening to send the plaintiff to Communist China through Hong Kong.

9. That the plaintiff is opposed to Communism and the plaintiff is an anti-communist.

10. That if deported to Communist China, the plaintiff will suffer physical persecution.

11. That the defendant has advised the plaintiff that his application claiming physical persecution will not be considered upon the ground that claims of physical persecution may not be asserted in exclusion cases.

12. That the defendant, acting through his agents, has arbitrarily and contrary to law determined not to honor any claims of persecution made by Chinese aliens in exclusion cases and has arbitrarily and contrary to law refused to exercise discretion to permit the plaintiff to remain in the United States.

13. That the plaintiff is not subject to deportation to Communist China.

14. That the order directing the deportation of the plaintiff to Communist China, through Hong Kong, is arbitrary, contrary to law, a gross abuse of discretion, and null and void.

15. That the deportation of the plaintiff to Communist

China is a violation of the provisions of the Immigration and Nationality Act, and the regulations of the Immigration Service, and deprives the plaintiff of due process of law.

16. That the defendant has advised the plaintiff to be ready for deportation to Communist China on July 6, 1955, and unless restrained will deport the plaintiff to Communist China causing him irreparable injury.

WHEREFORE, plaintiff prays for a judgment:

(a) Declaring that he is not deportable to Communist China;

(b) Directing the defendant to consider his claim of physical persecution;

(c) Restraining the defendant from deporting the plaintiff to Communist China;

(d) For such other and further relief as may be appropriate.

JACK WASSERMAN,
Attorney for Plaintiff,
902 Warner Building,
Washington 4, D. C.

ANDREW REINER,
Of Counsel.

MOTION FOR PRELIMINARY INJUNCTION

• Filed July 1, 1955

The plaintiff, Yen Mok, by his attorneys, moves the Court for an order granting a preliminary injunction against the defendant, restraining defendant from apprehending and deporting plaintiff pending determination of this suit and until further order of the Court, upon the grounds and in accordance with the prayers set forth in the complaint and other papers filed herein.

JACK WASSERMAN,
Attorney for Plaintiff.

(Attached affidavit omitted in printing).

MOTION TO DISMISS

Filed July 1, 1955

Comes now the defendant and by his attorney, the United States Attorney, moves this honorable Court to dismiss the complaint filed herein on the grounds that the Court lacks jurisdiction over the subject matter; the complaint fails to state a claim upon which relief may be granted, and fails to comply with the provisions of Rule 8(a), Federal Rules of Civil Procedure in that it does not contain a short and plain statement of the claim showing that the pleader is entitled to relief.

LEO A. ROVER,
United States Attorney.

ORDER

Filed July 1, 1955

This cause having come on for hearing on plaintiff's motion for a preliminary injunction and the defendant having filed a motion to dismiss the complaint herein, the same having been filed with the consent of attorney for the plaintiff and on order of the Court, and both motions having been argued and the Court having found that it is without jurisdiction of the subject matter and that the complaint fails to state a claim upon which relief may be granted, it is this 1st day of July, 1955,

ORDERED that the complaint herein be and the same is hereby dismissed and the motion for preliminary injunction be and the same is hereby denied, and it is

FURTHER ORDERED that plaintiff's oral application for a stay pending appeal be and is hereby denied.

RICHMOND B. KEECH,
Judge.

No. 12,800

COMPLAINT

Filed July 6, 1955

The plaintiff by his attorneys, respectfully alleges:

1. That this is an action for a declaratory judgment under

the Declaratory Judgment Act (28 U. S. C. 2201) and for review under the Administrative Procedure Act (5 U.S.C. 1001 et seq).

2. That the plaintiff is a native and citizen of China.

3. That the defendant is the Attorney General of the United States and is charged with the statutory duty to determine, after appropriate hearings, whether aliens are to be excluded or deported from the United States and supervises the administration of the Immigration and Naturalization Service.

4. That the plaintiff is not a permanent resident of the United States.

5. That the plaintiff arrived in the United States originally in 1943 as a seaman. He thereafter followed his calling as a seaman from 1943 to 1945 on American vessels and received a presidential citation during World War II.

6. Plaintiff last arrived in the United States on *April 17, 1952*, and was ordered excluded and thereafter paroled into the United States.

7. Plaintiff filed an application under Section 243(h) of the Immigration and Nationality Act of 1952, requesting that he not be deported to Communist China upon the ground that if he is sent there he will be subject to physical persecution.

8. That the defendant has designated Communist China as the place to which the plaintiff shall be deported and is threatening to send the plaintiff to Communist China through Hong Kong.

9. That the plaintiff is opposed to Communism and the plaintiff is anti-communist.

10. That if deported to Communist China, the plaintiff will suffer physical persecution.

11. That the defendant has advised the plaintiff that his application claiming physical persecution will not be considered upon the ground that claims of physical persecution may not be asserted in exclusion cases.

12. That the defendant, acting through his agents, has arbitrarily and contrary to law determined not to honor any claims of persecution made by Chinese aliens in exclusion cases and has arbitrarily and contrary to law refused

to exercise discretion to permit the plaintiff to remain in the United States.

13. That the plaintiff is not subject to deportation to Communist China.

14. That the order directing the deportation of the plaintiff to Communist China, through Hong Kong, is arbitrary, contrary to law, a gross abuse of discretion, and null and void.

15. That the deportation of the plaintiff to Communist China is a violation of the provisions of the Immigration and Nationality Act, and the regulations of the Immigration Service, and deprives the plaintiff of due process of law.

16. That the defendant has advised the plaintiff to be ready for deportation to Communist China on July 6, 1955, and unless restrained will deport the plaintiff to Communist China causing him irreparable injury.

WHEREFORE, plaintiff prays for a judgment:

(a) Declaring that he is not deportable to Communist China;

(b) Directing the defendant to consider his claim of physical persecution;

(c) Restraining the defendant from deporting the plaintiff to Communist China;

(d) For such other and further relief as may be appropriate.

JACK WASSERMAN,
Attorney for Plaintiff,
Warner Building,
Washington 4, D. C.

DAVID CARLINER,
Attorney for Plaintiff,
Warner Building,
Washington 4, D. C.

ABRAHAM LEBENKOFF,
Of Counsel.

MOTION FOR PRELIMINARY INJUNCTION

Filed July 6, 1955

The plaintiff, Lam Wing, by his attorneys moves the Court for an order granting a preliminary injunction against the defendant, restraining defendant from apprehending and deporting the plaintiff pending determination of this suit and until further order of the Court, upon the grounds and in accordance with the prayers set forth in the complaint and other papers filed herein.

JACK WASSERMAN,
Attorney for Plaintiff.

(Attached affidavit omitted in printing).

MOTION TO DISMISS

Filed July 3, 1955

Comes now the defendant and, by his attorney, the United States Attorney, moves this honorable Court to dismiss the complaint filed herein on the grounds that the Court lacks jurisdiction over the subject matter, the complaint fails to state a claim upon which relief may be granted, and fails to comply with the provisions of Rule 8(a), Federal Rules of Civil Procedure, in that it does not contain a short and plain statement of the claim showing that the pleader is entitled to relief:

LEO A. ROVER,
United States Attorney.

STIPULATION OF FACTS

Filed July 6, 1955

It is hereby stipulated by and between the attorneys for the parties hereto that the plaintiff is an alien, a native and citizen of China, who last entered the United States at Baltimore, Maryland on April 17, 1952. On that date he was ordered detained on board as a "male fide" seaman by the immigration authorities, and thus ordered excluded from the United States. He was subsequently paroled into the

United States under bond, and his case re-examined at New York on May 23, 1952, at which time it was concluded that the evidence sustained the exclusion order of April 17, 1952 and that order remained in effect.

On June 20, 1955 plaintiff submitted an application pursuant to Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253 (h), to have his deportation withheld on the ground that he would be subject to physical persecution if returned to China. The immigration authorities, to which the application was submitted, advised the plaintiff that they would not consider the application on the ground that as a matter of law such relief was not available to an alien ordered excluded from the United States.

(S.) DAVID CARLINER,

Attorney for Plaintiff.

(S.) WILLIAM F. BECKER,

Assistant United States Attorney.

(S.) WILLIAM B. TAFFET,

Special Assistant to the United States Attorney.

ORDER

Filed July 6, 1955

This cause having come on for hearing on plaintiff's motion for a preliminary injunction and the defendant having filed a motion to dismiss the complaint herein, the same having been filed with the consent of attorney for the plaintiff and on order of the Court, and both motions having been argued and the Court having found that it is without jurisdiction of the subject matter and that the complaint fails to state a claim upon which relief may be granted, it is this 6th day of July, 1955,

ORDERED that the complaint herein be and the same is hereby dismissed and the motion for preliminary injunction be and the same is hereby denied, and it is

FURTHER ORDERED that plaintiff's oral application for a stay pending appeal be and is hereby denied.

RICHMOND B. KEECH,

Judge.

No. 396

Office of the Clerk
U. S. Supreme Court
AUG 28 1957
JOHN T. FLY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957

HERBERT BROWNELL, JR., ATTORNEY GENERAL,
PETITIONER

v.

JIMMIE QUAN, ALSO KNOWN AS QUAN DUNG NGOON,
JOW MUN YOW AND JOW KWONG YEONG, YEN
MOK, AND LAM WING

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

J. LEE RANKIN,
Solicitor General

WARREN OLNEY III,
Assistant Attorney General

BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	4
Reasons for granting the writ	5
Conclusion	6
Appendix A	7
Appendix B	11
Appendix C	13

CITATIONS

Cases:

<i>Brownell v. Tom We Shung</i> , 352 U. S. 180	5
<i>Dong Wing Ott and Dong Wing Han v. Shaughnessy</i> (C.A. 2), decided July 5, 1957	14
<i>Leng May Ma v. Barber</i> , 241 F. 2d 85, certiorari granted, 353 U. S. 981 (No. 105, this Term)	5
<i>United States ex rel. Lue Chow Yee and Lue Chow Lon v. Shaughnessy</i> (C.A. 2), decided July 5, 1957	13

Statutes:

Immigration Act of 1917, Section 18, 39 Stat. 887, as amended, 8 U.S.C. 154 (1946 ed.)	3
Immigration and Nationality Act of June 27, 1952, 66 Stat. 163:	
Section 212(d)	3
Section 237(a)	2
Section 243(h)	2

In the Supreme Court of the United States

OCTOBER TERM, 1957

No.

HERBERT BROWNELL, JR., ATTORNEY GENERAL,
PETITIONER

v.

JIMMIE QUAN, ALSO KNOWN AS QUAN DUNG NGOON,
JOW MUN YOW AND JOW KWONG YONG, YEN
MOK, AND LAM WING

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Attorney General, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cases on June 27, 1957.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 7-10) has not yet been reported.

(1)

JURISDICTION

The judgment of the Court of Appeals was entered June 27, 1957 (App. B, *infra*, pp. 11-12). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether excluded aliens who have failed to establish their right to enter the United States and who have been admitted into the country only on parole are entitled to have applications for withholding of deportation entertained under Section 243(h) of the Immigration and Nationality Act of 1952, on the ground that, if deported, they would be subject to physical persecution.

STATUTES INVOLVED

Section 243(h) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 214, provides:

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

Section 237(a) of the same Act provides in relevant part:

(a) Any alien (other than an alien crewman) arriving in the United States who is excluded under this Act, shall be immediately deported

to the country whence he came, in accommodations of the same class in which he arrived, on the vessel or aircraft bringing him, unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper. * * *

Section 212(d) of the same Act provides in relevant part:

(5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Section 18 of the Immigration Act of 1917, 39 Stat. 887, as amended, 8 U.S.C. 154 (1946 ed.), provides in relevant part:

All aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class in which they arrived, to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper. * * *

STATEMENT

The Court of Appeals for the District of Columbia Circuit has held, in four cases consolidated for briefing and argument, that the district court erred in dismissing, for failure to state a cause of action, complaints by excluded aliens which alleged that the Attorney General had wrongfully failed to consider their applications for withholding of deportation under Section 243(h) of the Immigration and Nationality Act of 1952. Their applications alleged that they would be subject to physical persecution if deported to Communist China.

The complaints alleged, more particularly, that the plaintiffs named therein were persons born in China who had arrived in the United States, had been paroled into this country, and had been held excludable. The plaintiffs in two of the cases (Quan and Yow) claimed admission as United States citizens. They had arrived and had been paroled prior to the effective date of the Immigration and Nationality Act of 1952, but had been ordered excluded after the effective date of that Act (R. 33-34, 36-37). Respondent Yen Mok, who alleged merely that he had arrived in the United States in December 1954, was paroled and was ordered excluded after the effective date of the 1952 Act (R. 40). Lam Wing arrived as a seaman, was ordered excluded, and then paroled prior to the effective date of the 1952 Act (R. 43).

Each of the respondents also alleged that in 1955, after each had been notified that Communist China had been designated as the place to which he would

5
be deported, he had applied for stay of deportation under Section 243(h) of the Immigration and Nationality Act of 1952 on the ground that he would be subject to physical persecution, but that he had been advised that his application could not be considered for the reason that a claim of physical persecution could not be asserted in an exclusion case. Each sought a judgment declaring that he was not deportable to Communist China and directing consideration of his claim of physical persecution. (R. 33, 34, 37-38, 40-41, 43-44).

The district court dismissed the complaints for lack of jurisdiction¹ and for failure to state a claim upon which relief might be granted (R. 35-36, 39, 42, 46). The court of appeals reversed, holding that aliens seeking admission who had been paroled into the United States; under Section 212(d)(5) of the 1952 Act, were "within the United States" for the purposes of Section 243(h).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the District of Columbia Circuit in these cases is in direct conflict with that of the Court of Appeals for the Ninth Circuit in *Leng May Ma v. Barber*, 241 F. 2d 85, certiorari granted, 353 U.S. 981 (No. 105, this Term). The Ninth Circuit has held that relief un-

¹ This ruling was made before the decision of this Court in *Brownell v. Tom We Shung*, 352 U.S. 180, holding that an exclusion order may be reviewed in a declaratory judgment action.

der Section 243(h) of the Immigration and Nationality Act of 1952 is not available to excluded aliens, admitted into the United States on parole, since such aliens are not, in legal contemplation, "within the United States." The decision below is also directly in conflict with two recent decisions of the Second Circuit, copies of which are set forth in Appendix C, *infra*, pp. 13-15. The Second Circuit has, *per curiam*, affirmed, on the basis of the district court opinions, two rulings similar to that rendered in the *Leng May Ma* case.

CONCLUSION

The question raised by this petition is already before the Court in No. 105, this Term. Moreover, since the writ was granted in No. 105, a direct conflict among the circuits has developed. Accordingly, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

AUGUST 1957.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12772

JIMMIE QUAN, a/k/a QUAN DUNG NGOON, APPELLANT
v.HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

No. 12773

JOW MUN YOW and JOW KWONG YEONG, APPELLANTS
v.HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

No. 12774

YEN MOK, APPELLANT
v.HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

No. 12800

LAM WING, APPELLANT
v.HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEEAppeals from the United States District Court
for the District of Columbia

Decided June 27, 1957

Mr. David Carliner, with whom Mr. Jack Wasserman was on the brief, for appellants.

Mr. John W. Kern, III, Assistant United States Attorney, with whom Mr. Oliver Gasch, United States Attorney, and Mr. Lewis Carroll, Assistant United States Attorney, were on the brief, for appellee.

Before PRETTYMAN, FAHY and BURGER, Circuit Judges.

PRETTYMAN, *Circuit Judge*: These are four appeals from judgments of the District Court dismissing complaints in civil actions. The actions were brought by natives of China who arrived in the United States at various dates seeking admission. They were paroled into the United States in exclusion proceedings. Thereafter they were ordered excluded and deported to the place whence they came, which was Hong Kong.¹ They claim that deportation to Hong Kong is in fact deportation to Communist China and that if sent there they will be subject to physical persecution. They seek the benefit of Section 243(h) of the Immigration and Nationality Act of 1952,² which provides:

"The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

The Government says the appellants are not "within the United States" and therefore the Attorney General has no power under the statute to withhold their deportation. The question before us is whether he has that power. We are not concerned with how

¹ Appellant Lam Wing was paroled after an initial exclusion order.

² 66 STAT. 214, 8 U.S.C.A. § 1253(h).

he should exercise the power if he has it. We have to decide merely whether he has it.

Section 212(d) (5) of the 1952 Act³ provides in pertinent part:

"The Attorney General may in his discretion *parole into the United States* temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien * * *." (Emphasis ours.)

Thus it is clear that under the Act an alien may be paroled *into* the United States as well as admitted to it. In either event he is, in the statutory terms, in the United States. We think an alien paroled into the United States within the meaning of Section 212(d) (5)⁴ is within the United States within the meaning of Section 243(h). Therefore as to him the Attorney General has a discretionary power to withhold deportation.

The Attorney General argues that there is a difference between excluding an alien and deporting him⁵ and that these aliens are to be excluded. But the very sentence of the statute which provides for excluding aliens⁵ uses the word "deported". The concluding clause in that sentence is "shall be allowed to enter or shall be excluded and deported." And the

³ 66 STAT. 188, 8 U.S.C.A. § 1182(d) (5).

⁴ The Act contains a number of provisions relating to aliens within the United States. See Sec. 237(a), 66 STAT. 201, 8 U.S.C.A. § 1227(a); Sec. 237(b), 66 STAT. 201, 8 U.S.C.A. § 1227(b); Sec. 262, 66 STAT. 224, 8 U.S.C.A. § 1302; Sec. 265, 66 STAT. 225, 8 U.S.C.A. § 1305; Sec. 360(a), 66 STAT. 273, 8 U.S.C.A. § 1503(a).

⁵ Sec. 236(a), 66 STAT. 200, 8 U.S.C.A. § 1226(a).

sentence which provides for the return of excluded aliens on the vessel bringing them uses the words "deported" and "deportation". The basic sentence is: "Any alien * * * who is excluded * * * shall be immediately deported * * *." And the proviso in that sentence is "unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper." The Regulations reflect the same idea. For example, Section 243.1, Title 8, Code of Federal Regulations (1952) speaks of "The immediate deportation of an excluded alien". The distinction relevant to Section 243 is between aliens who are, legally speaking, in the United States, by entry or parole, and those who, legally speaking, are not within the borders.

That the predecessor section to Section 243(h) of the 1952 Act, which was Section 23 of the 1950 Act, applied to an alien who was excluded and was settled by *Ng Lin Chong v. McGrath*.⁶ Section 243(a) of the 1952 Act applies to aliens "in the United States". We think that section gives the Attorney General discretion in respect to the country to which he will order aliens deported, whether they are legally in the United States by entry or by parole.

The cases will be remanded to the District Court with instructions to enter declaratory judgments in accord with this opinion.

⁶ Sec. 237(a), 66 STAT. 201, 8 U.S.C.A. § 1227(a).

⁷ 64 STAT. 1010.

⁸ 91 U.S. App. D.C. 131, 202 F. 2d 316 (D.C. Cir. 1952).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957.

C. A. 2801-55

No. 12,772

JIMMIE QUAN, a/k/a QUAN DUNG NGOON, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

April Term, 1957.

C. A. 2764-55

No. 12,773

JOW MUN YOW and JOW KWONG YEONG, APPELLANTS

v.

HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

April Term, 1957.

C. A. 2899-55

No. 12,774

YEN MOK, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

April Term, 1957.

C. A. 2934-55

No. 12,800

LAM WING, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

Appeals from the United States District Court
for the District of Columbia

Before: Prettyman, Fahy and Burger, Circuit
Judges.

JUDGMENT

These cases came on to be heard on the records from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgments of the said District Court appealed from in these cases be, and they are hereby, reversed, and that these cases be, and they are hereby, remanded to the said District Court with instructions to enter declaratory judgments in accord with the opinion of this Court.

Dated: June 27, 1957

Per Circuit Judge Prettyman.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 297—October Term, 1956.

(Argued June 10, 1957 Decided July 5, 1957.)

Docket No. 24414

UNITED STATES OF AMERICA *ex rel.* LUE CHOW YEE
and LUE CHOW LON,*Relators-Appellants,*

v.

EDWARD J. SHAUGHNESSY, District Director of the
New York District of the
Immigration and Naturalization Service,
Defendant-Respondent.

Before:

CLARK, *Chief Judge*, and
CHASE and HINCKS, *Circuit Judges.*Appeal from the United States District Court for
the Southern District of New York, Irving R. Kauf-
man, *Judge.*Lue Chow Yee and Lue Chow Lon appeal from the
dismissal of their petition for habeas corpus seeking
stay of exclusion from this country on their claim for
discretionary relief under §243(h) of the Immigration
and Nationality Act of 1952, 8 U. S. C. §1253(h).See also *Lue Chow Kon v. Brownell*, 2 Cir., 220
F.2d 187, affirming D. C. S. D. N. Y., 122 F. Supp.
370.CHARLES SPAR, of Spar, Schlem & Burroughs,
New York City (Max K. Schlem and Joseph

L. Andrews, of Spar, Schlem & Burroughs, New York City, on the brief), *for relators-appellants*.

ROY BABITT, Sp. Asst. U. S. Atty. and Gen. Atty., Immigration and Naturalization Service, New York City (Paul W. Williams, U. S. Atty., S. D. N. Y., and Harold J. Raby, Asst. U. S. Atty., New York City, on the brief), *for defendant-respondent*.

PER CURIAM:

Affirmed on the opinion of District Judge Kaufman below, D. C. S. D. N. Y., 146 F. Supp. 3; and see also *Leng May Ma v. Barber*, 9 Cir., 241 F. 2d 85, certiorari granted — U. S. —, June 3, 1957.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 316—October Term, 1956.

(Argued June 10, 1957 Decided July 5, 1957.)

Docket No. 24246

DONG WING OTT and DONG WING HAN,
Plaintiffs-Appellants,

v.

EDWARD J. SHAUGHNESSY, District Director of the
New York District of the
Immigration and Naturalization Service,
Defendant-Respondent.

Before:

CLARK, *Chief Judge*, and
CHASE and HINCKS, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge*.

Dong Wing Ott and Dong Wing Han appeal from the denial of an injunction for stay of deportation on their claim for discretionary relief under §243(h) of the Immigration and Nationality Act of 1952, 8 U. S. C. §1253(h).

See also *U. S. ex rel. Dong Wing Ott v. Shaughnessy*, 2 Cir., 220 F. 2d 537, affirming D. C. S. D. N. Y., 116 F. Supp. 745, certiorari denied 350 U. S. 847.

ELMER FRIED, New York City, for plaintiffs-appellants.

ROY BABITT, Sp. Asst. U. S. Atty. and Gen. Atty., Immigration and Naturalization Service, New York City (Paul W. Williams, U. S. Atty., S. D. N. Y., Charles J. Hartenstine, Jr., Sp. Asst. U. S. Atty., and Harold J. Raby, Asst. U. S. Atty., New York City, on the brief), for defendant-respondent.

PER CURIAM:

Affirmed on the opinion of District Judge Murphy below, D. C. S. D. N. Y., 142 F. Supp. 379; and see also *Leng May Ma v. Barber*, 9 Cir., 241 F. 2d 85, certiorari granted — U. S. —, June 3, 1957.

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SUPREME COURT U. S.

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No. 396

In the Supreme Court of the United States

OCTOBER TERM, 1957

WILLIAM P. ROGERS, ATTORNEY GENERAL, PETITIONER

v.

JIMMIE QUAN, ALSO KNOWN AS QUAN DUNG NGOON,
JOW MUN YOW AND JOW KWONG YEONG, YEN MOK,
AND LAM WING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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Solicitor General,

MALCOLM ANDERSON,

Assistant Attorney General,

BEATRICE ROSENBERG,

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INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Question presented.....	1
Statutes involved.....	2
Statement.....	3
Argument.....	6
Conclusion.....	8

CITATIONS

Cases:

<i>Brownell v. Tom We Shung</i> , 352 U. S. 180.....	5
<i>Leng May Ma v. Barber</i> , No. 105, this Term.....	6, 8

Statutes:

Immigration Act of 1917, 39 Stat. 874, .887, as amended, 8 U. S. C. (1946 ed.) 154, Section 18.....	3
Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, <i>et seq.</i> :	
Section 212 (d) (5) (8 U. S. C. 1182 (d)).....	2, 4, 5, 6
Section 237 (a) (8 U. S. C. 1227 (a)).....	2
Section 243 (h) (8 U. S. C. 1253 (h)).....	2, 4, 5, 6

(1)

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 396

WILLIAM P. ROGERS, ATTORNEY GENERAL, PETITIONER
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 17) is reported at 248 F. 2d 89.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1957 (R. 22). The petition for a writ of certiorari was filed on August 23, 1957, and was granted on October 28, 1957 (R. 22). The jurisdiction of this Court rests on 28 U. S. C. 1254-(1).

QUESTION PRESENTED

Whether excluded aliens who have failed to establish their claims of right to enter the United States, and who have been admitted into the country only on

parole, are entitled to have applications for withholding of deportation entertained under Section 243 (h) of the Immigration and Nationality Act of 1952, on the ground that, if deported, they would be subject to physical persecution.

STATUTES INVOLVED

Section 243 (h) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 214, provides:

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

Section 237 (a) of the same Act provides in relevant part:

(a) Any alien (other than an alien crewman) arriving in the United States who is excluded under this Act, shall be immediately deported to the country whence he came, in accommodations of the same class in which he arrived, on the vessel or aircraft bringing him, unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper. * * *

Section 212 (d) of the same Act provides in relevant part:

(5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe

for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States; but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

* / * * * *

Section 18 of the Immigration Act of 1917, 39 Stat. 887, as amended, 8 U. S. C. (1946 ed.) 154, provides in relevant part:

All aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class, in which they arrived, to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General, immediate deportation is not practicable or proper. * * *

STATEMENT

The five respondents, natives and citizens of China ordered excluded from this country, sought to have the United States District Court for the District of Columbia direct the Attorney General to consider their claims, made under Section 243 (h) of the Immigration and Nationality Act of 1952, that they would be subject to physical persecution if deported to Communist China. The District Court dismissed

the complaints,¹ and the Court of Appeals, hearing a consolidated appeal, reversed.

The complaints alleged that respondents were paroled into this country. Jimmie Quan, alias Quan Dung Ngoon, last arrived on July 13, 1949, claiming American citizenship, was paroled thereafter, and was ordered excluded on December 3, 1954 (R. 2). Jow Mun Yow and Jow Kwong Yeong arrived on October 21, 1951, likewise claiming American citizenship. They were paroled on July 22, 1952, and ordered excluded on August 14, 1953 (R. 5). Yen Mok arrived in December of 1954. He was paroled thereafter and ordered excluded on May 23, 1955 (R. 9). Lam Wing, who arrived originally as a seaman in 1943, last arrived on April 17, 1952, was ordered excluded, and was then paroled into the United States (R. 12).

The complaints further alleged that respondents were threatened with deportation to Communist China through Hong Kong;² that they filed applications under Section 243 (h) of the Immigration and Nationality Act of 1952 for a stay, on the ground that such deportation would subject them to physical persecution; and that the Attorney General advised them that their applications could not be considered because Section 243 (h) was inapplicable to exclusion cases (R. 2, 5-6, 9, 12-13). The complaint of Quan also alleged a denial by the Attorney General of his request for continued parole under Section 212 (d) (5) of the

¹ The complaints totaled four in number, two of the complainants having filed jointly.

² Respondents were ordered excluded and deported to the place from whence they came—Hong Kong.

1952 Act (R. 2). All of the respondents asserted that the refusal to consider their applications was arbitrary and contrary to law. They asked for declaratory judgments that they were not deportable to Communist China, that the Attorney General be restrained from deporting them there, and that he be directed to consider their applications for a stay under Section 243 (h) (R. 3, 7, 10, 13).

The District Court dismissed the complaints for lack of jurisdiction³ and for failure to state claims upon which relief might be granted (R. 4, 8, 11, 16). The Court of Appeals, in reversing, held that the Attorney General has the power, under Section 243 (h) of the Act, to withhold the deportation of an alien on the ground of physical persecution, whether such alien was in the country by legal entry or merely on parole (R. 17-20).

After the grant of certiorari by this Court, the cause was held in abeyance to enable the respondents to seek further administrative relief in the form of current requests for continued parole under Section 212 (d) (5) of the 1952 Act, since it had been concluded that the Attorney General has power to grant continued parole to an excluded alien "for emergent reasons or for reasons deemed strictly in the public interest" and that a claim of danger of physical persecution was a relevant factor to be considered in ap-

³ This ruling was made before the decision of this Court in *Brownell v. Tom We. Shung*, 352 U. S. 180, holding that an exclusion order may be reviewed in a declaratory judgment action.

plying that standard.⁴ Respondents requested further parole in January and February of 1958. On February 12th and 13th, 1958, after a consideration of the requests, including the allegations as to physical persecution, it was decided that parole would not be continued.⁵

ARGUMENT

We have briefed, in the companion case of *Leng May Ma v. Barber*, No. 105, the issue of the applicability of Section 243 (h) of the Immigration and Nationality Act of 1952 to excluded aliens who have been admitted into this country only on parole. In that brief, we urge that the context and legislative history of Section 243 (h) demonstrate that this Section encompasses only the grant of relief to aliens legally in the country who are ordered *expelled*; that an *excluded* alien cannot be regarded as an "alien within the United States" in the meaning of Section 243 (h); and that neither detention in custody nor enlargement on parole constitutes an admission into the United States or otherwise changes the legal status of an excluded alien. This line of argument is fully applicable to the instant case and is incorporated by reference.

⁴ Briefing of the case in this Court was suspended pursuant to the Court's grant of the Solicitor General's motion, in which counsel for respondents acquiesced. This motion was the same as the one filed in the companion *Leng May Ma* case, No. 105. See respondent's brief in No. 105, p. 5.

⁵ The denials were by the District Director, Immigration and Naturalization Service, San Francisco District (requests of Jimmie Quan, Jow Mun Yow and Jow Kwong Yeong) and by the District Director of the New York District (requests of Yen Mok and Lam Wing).

In this case, it should be noted further that the complaint of Jimmie Quan, filed in the District Court, alleged the denial of a request for continued parole under Section 212 (d) (5) of the 1952 Act (R. 2). The matter of continued parole, however, was not the issue decided by the Court of Appeals and was not brought to this Court on the government's petition for a writ of certiorari. Insofar as the record suggested the possibility of error in declining to consider Quan's original request under 212 (d) (5), that error has been cured by the subsequent consideration of his later request for such relief.

As set forth in our brief in No. 105, we believe that a request for parole under Section 212 (d) (5) (which all respondents here have recently, but unsuccessfully, sought) is a matter exclusively within the jurisdiction of the executive branch of the Government.⁶ In all events, in the present posture of this case and of No. 105, the only issue before the Court is the applicability of Section 243 (h) to excluded aliens.

⁶ As in the case of petitioner in No. 105, we are advised by the Immigration and Naturalization Service that the recent requests for continued parole under Section 212 (d) (5) were denied because, among other reasons, the respondents failed to establish, in the Service's view, that they would be subject to physical persecution if removed to Communist China.

CONCLUSION

For the reasons set forth in the Government's brief in *Leng May Ma v. Barber*, No. 105, this Term, it is respectfully submitted that the judgment of the court below should be reversed.

J. LEE RANKIN,

Solicitor General.

MALCOLM ANDERSON,

Assistant Attorney General.

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JULIA P. COOPER,

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MARCH 1958.

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No. 396

In the Supreme Court of the United States

OCTOBER TERM, 1957

WILLIAM P. ROGERS, ATTORNEY GENERAL,
PETITIONER

v.

JIMMIE QUAN, ALSO KNOWN AS QUAN DUNG NGOON,
JOW MUN YOW AND JOW KWONG YEONG, YEN MOK,
AND LAM WING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INDEX

	Page
Introduction and Summary.....	1
I. Section 237 governs the return of excluded aliens regardless of whether return takes place im- mediately or is delayed for the benefit of the alien.....	1
II. The fact that Section 237 (a) provides for aliens "excluded under this Act" does not make Sec- tion 243 (h) applicable to those respondents who sought entry prior to 1952.....	11
III. The provisions of the 1952 Act govern these appli- cations for stays of deportation.....	16
Conclusion.....	18

CITATIONS

Cases:

<i>Accardi v. Shaughnessy</i> , 347 U. S. 260.....	17
<i>Ceballos v. United States</i> , 352 U. S. 599.....	17
<i>Kaplan v. Tod</i> , 267 U. S. 228.....	8, 11
<i>Leng May Ma v. Barber</i> , No. 405, this Term.....	3, 18
<i>Low King Yong v. Pan American Airways</i> , 74 F. Supp. 657.....	8
<i>Ng Lin Chong v. McGrath</i> , 202 F. 2d 316.....	10, 16
<i>R —</i> ; <i>In the Matter of</i> , A-6295221, 2, decided October 9, 1947, 3 I. & N. Dec. 45.....	8
<i>Shomberg v. United States</i> , 348 U. S. 540.....	12
<i>United States v. Nord Deutscher Lloyd</i> , 223 U. S. 512.....	5
<i>United States ex rel. Camezon v. District Director of Immigration & Naturalization at Port of New York</i> , 105 F. Supp. 32.....	13
<i>United States ex rel. Dolenz v. Shaughnessy</i> , 206 F. 2d 392.....	17

Statutes:

Page

Immigration Act of 1907, 34 Stat. 898, Sec. 19..... 5

Immigration Act of 1917, 39 Stat. 874, as amended:

Sec. 18 (8 U. S. C. 154)..... 2-3, 5, 10, 12, 16

Sec. 20, as amended by Sec. 23 of the Internal
Security Act of 1950 (8 U. S. C. (1946 ed.,
Supp. V) 156 (a))..... 2, 3, 16, 17

Immigration and Nationality Act of 1952, 66 Stat. 163,

et seq.:

Sec. 212 (d) (5) (8 U. S. C. 1182 (d))..... 2, 5, 6, 7, 8, 9, 11

Sec. 236 (a) (8 U. S. C. 1226 (a))..... 9

Sec. 236 (b) (8 U. S. C. 1226 (b))..... 10

Sec. 237 (8 U. S. C. 1227)..... 4, 10, 11

Sec. 237 (a) (8 U. S. C. 1227 (a))..... 1, 2, 3, 4, 5, 7, 9, 11, 12, 16

Sec. 237 (b) (8 U. S. C. 1227 (b))..... 4

Sec. 237 (c) (8 U. S. C. 1227 (c))..... 5

Sec. 242 (8 U. S. C. 1252 (b))..... 14

Sec. 243 (a) (8 U. S. C. 1253 (a))..... 1, 3, 4, 9, 11, 12, 13, 14

Sec. 243 (c) (8 U. S. C. 1253 (c))..... 14

Sec. 243 (h) (8 U. S. C. 1253 (h))..... 1, 3, 14, 16, 17, 18

Sec. 244 (8 U. S. C. 1254)..... 17

Sec. 405 (a)..... 3, 12, 16

Sec. 407..... 11

Miscellaneous:

Analysis of S. 716, 82d Cong., prepared by General
Counsel, I. & N. Service..... 5, 6

Annual Report of the Commissioner of Immigration,
included in Annual Report of the Attorney General:

For 1956..... 9

For 1957..... 10

House Report 1365, 82nd Cong., 2nd Sess..... 7

S. 716, 82d Cong..... 5

In the Supreme Court of the United States

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WILLIAM P. ROGERS, ATTORNEY GENERAL,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION AND SUMMARY

In urging that Section 243 (h) of the Immigration and Nationality Act of 1952 applies both to excluded aliens and those within the United States who have been ordered deported, respondents contend that:

(a). Section 237 (a) (the exclusion provision) is applicable only when the excluded alien is ordered to return to the country from whence he came immediately after an attempted entry into the United States, and that, if this order of return is delayed, the deportation procedures of Section 243 (of the 1952 Act) must be invoked.

(b). Section 237 (a) applies only to aliens excluded subsequent to the effective date of the 1952 Act and that aliens who sought entry prior thereto, as did four of the respondents here (all but Yen Mok), can be expelled only pursuant to Section 243 (a).

(c). The applications for stays filed by the respondents, except Yen Mok, are covered by the Immigration Act of 1917, as amended by the Internal Security Act of 1950.

We will state herein our reasons for believing that none of these contentions is sound.

The language of Section 237 (a), the legislative history of that section, and the position and function of the section in the Act as a whole and against the background of well-established concepts of immigration law, all serve to demonstrate that Section 237 is the sole provision governing the return of *excluded* aliens. When Section 237 (a) is read, as it must be, in the light of the parole provisions of Section 212 (d) (5), it becomes evident that Section 237 (a) governs exclusion cases regardless of whether, for the benefit of the alien, a period of parole intervenes between the time of the alien's attempted entry and the order to depart to the country from whence he came.

If Section 237 (a) is deemed to be inapplicable to the four respondents (all but Yen Mok) who sought entry prior to December 1952, because that section has reference to aliens "excluded under this Act," then the authority to return the aliens to the country from whence they came is found in Section 18 of the

Immigration Act of 1917, by virtue of the 'savings clause' contained in Section 405 of the 1952 Act. There is no basis for assuming that the limitation to aliens "excluded under this Act" contained in Section 237 (a) was intended by Congress to make applicable to previously excluded aliens the provisions of Section 243 (a) of the 1952 Act which, as we show in our principal brief in *Leng May Ma v. Barber*, No. 105, pp. 12-19, relates exclusively to deportation, not exclusion. Moreover, respondents' contention that subsection (a) of Section 243 is applicable to excluded aliens whose departure has been delayed, even if that argument were valid, would not establish that subsection (h) of Section 243, which contains the further limitation to aliens "within the United States," has any such application.

Finally, we submit that, regardless of the time of attempted entry, the applications which form the basis of this suit constitute separate proceedings which were commenced subsequent to the effective date of the 1952 Act; that the Immigration Service was asked to act solely under the 1952 Act; and that the complaints herein allege a failure to exercise discretion only under the 1952 Act. There is no basis therefore for the contention presently advanced that the applications of the four respondents who sought entry prior to 1952 are governed by Section 20 of the Act of 1917, as amended. Section 20 of the 1917 Act, in any event, applied, as does Section 243 (h) of the 1952 Act, only to aliens in the United States, not excluded aliens.

SECTION 237 GOVERNS THE RETURN OF EXCLUDED ALIENS
REGARDLESS OF WHETHER RETURN TAKES PLACE IMMEDIATELY OR IS DELAYED FOR THE BENEFIT OF THE ALIEN

Section 237 (a) begins, "Any alien (other than an alien crewman) arriving in the United States who is excluded under this Act, shall be immediately deported to the country whence he came * * * unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper." Respondents urge that only "deportation" which is "immediate" is governed by this provision and that, if delayed, the alien's status must be equated with that of one within the United States and subject to the regular deportation provisions of Section 243 (a). We believe that this contention is refuted by a reading of Section 237 in its entirety which clearly shows that the section governs cases of aliens who are not "immediately" sent back. The very next sentence of the section provides that "The cost of the maintenance *including detention expenses and expenses incident to detention of any such alien while he is being detained* * * * shall be borne by the owner or owners of the vessel or aircraft on which he arrived * * *." (Emphasis added.) Section 237 (b) provides that "It shall be unlawful for any master * * * of any vessel or aircraft * * * (3) to refuse or fail to remove him from the United States *to the country whence he came*; (4) to fail to pay *the cost of his maintenance while being detained* as required by this section or section 233 of this

title * * *." (Emphasis added.) Similarly, Section 237 (c) provides for the imposition of costs where the vessel upon which the alien arrived has left the United States and it is impractical to transport the alien within a reasonable time on another vessel of the same ownership.¹

Moreover, Section 237 (a) must be read in the light of the parole provisions of Section 212 (d) (5). The language of Section 212 (d) (5) and the legislative history of both sections confirm the fact that Congress intended exclusion proceedings to be governed by Section 237 even where departure was not immediate.

In an earlier draft of the 1952 Immigration Act, S. 716, the parole provisions contained in Section 212 (d) (5) were made applicable only to aliens requiring medical treatment. As petitioner in No. 105 points out (Br. 21-22), the Immigration Service, in the analysis of the bill furnished to Congress and on file in this Court, urged that the provision be broadened to include reasons other than medical. In this same version of the bill, Section 237 (a) read: "Any alien arriving in the United States who is excluded under this Act, shall be immediately deported * * * unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper." In its comments on this section,

¹ Cf. *United States v. Noid Deutscher Lloyd*, 223 U. S. 512, 517, where the Court noted that Section 19 of the Immigration Act of 1907 (the predecessor of Section 18 of the 1917 Act and Section 237 of the 1952 Act) required that the transportation companies "should not only maintain the aliens unlawfully brought by them into this country, but should take them back free of charge."

the Immigration Service noted the difficulties it had encountered in cases "in which immediate deportation of excluded aliens is not practicable". Following the passage quoted in petitioner's brief in No. 105, pp. 21-22, the Service went on to state:

In line with the foregoing it is suggested that on line 22, page 90, immediately following the word "proper", there be inserted the following language: "In any case in which the Attorney General concludes that immediate deportation is not practicable or proper, the Attorney General, may in his discretion, and under such conditions as to him may appear appropriate, temporarily parole any such alien into the United States: *Provided*, that whenever the Attorney General, in his discretion concludes that deportation of any alien paroled under this subsection is practicable or proper, the alien shall immediately be taken into custody under the outstanding order of exclusion and deportation and shall be deported; without further hearing, *in the same manner as other aliens who are excluded from the United States.*" [Emphasis added]

Thereafter, and in response to these suggestions, Section 212 (d) (5) was amended to read as it now does:

(5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such

parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and *thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.* [Emphasis added.]

Thus, the revision recommended by the Service in Section 237 (a) was accomplished in the modification of Section 212 (d) (5). House Report 1365, 82d Congress, 2d Sess., p. 52, describing the changes in Section 212 (d) (5), stated: "The provision in the instant bill represents an acceptance of the recommendation of the Attorney General with reference to this form of discretionary relief." "The language of Section 212 (d) (5) fully reflects and carries out the intent of the Service proposal which was explicit that "deportation" following parole of an excluded alien shall be "in the same manner as other aliens who are excluded from the United States." (Emphasis added.) Since the Service recommendation was effected in a more general parole provision having reference to applicants "for admission," some of whom may not previously have been excluded, the language recommended by the Service was revised to read "in the same manner as that of any other applicant for admission"; but the basic concept that parole would not alter the immigration status of the alien is clearly reflected in Section 212 (d) (5) as that section was enacted by Congress. In the light of this legislative history, it is apparent that there is no merit to respondents' suggestion that Congress intended that excluded aliens whose return was

not immediate should enjoy an enhanced status by virtue of their parole.

Respondents seek in two ways to avoid the clear impact of Section 212 (d) (5). First, they note (Br. 23, fn. 8) that two of the respondents were paroled prior to the effective date of the 1952 Act, and the record is not clear as to the time of parole of two others. (Parole has of course been continued, as to those previously paroled, since the 1952 Act became effective.) However, the administrative device of paroling excluded aliens is one of long standing, which well antedated the 1952 Act.² The fact that parole did not alter the excluded alien's status was recognized by the Service and this Court, (see, e. g., *Kaplan v. Tod*, 267 U. S. 228) long before the 1952 Act went into effect. Section 212 (d) (5) therefore merely codified a judicially recognized administrative practice under which it was clear that parole did not bring the alien "within the United States."

Second, respondents urge (Br. 24) that the provision in Section 212 (d) (5) to the effect that "thereafter his case shall continue to be dealt with in the same manner as any other applicant for admission to the United States" indicates that only after the Service's physical custody of the alien is restored (i. e., after parole is revoked or ended) is the alien's status unchanged.

² *In the Matter of R* —, A-6295221, 2, decided October 9, 1947, 3 I. & N. Dec. 45; *Low King Yeng v. Pan American Airways*, 74 F. Supp. 657, 658-659 (D. Hawaii).

³ This contention is not, and could not be, advanced on behalf of petitioner in No. 105. There, the request for a stay was forwarded to the Immigration Service on January 18, 1954 (R. 7), after the petitioner had been ordered returned to custody as of January 15, 1954 (R. 4). She surrendered on or about that date (Pet. Br. 8).

This strained reading of the statute ignores both the prior administrative practice and the legislative history of the section. Moreover, this reading is hostile to parole since it suggests that the alien should be detained; but it is obviously to the alien's benefit to be continued on parole for as long as possible; and no worthwhile purpose would have been served by requiring an earlier return to detention. It is, we submit, clear that the very purpose of Section 212 (d) (5) would be frustrated if, by virtue of parole, the status of the alien were altered.

Thus, there is no basis for the argument that Section 237 (a) applies only where the alien is immediately sent back to the country from whence he came. Indeed, restriction of this section to "immediate" departures could, to a large extent, nullify the provision. Since aliens seeking entry to the United States are entitled to have their status determined on the

* Respondents' contention that the record does not indicate that parole here was granted solely for the aliens' benefit because, for example, the government was saved the expense and bother of detention is, to say the least, unpersuasive. The record does not contain any indication that respondents protested their release on parole.

⁵ "Since November 1954 only those aliens likely to abscond and those whose release would be inimical to the security of the United States are held in detention. Detention of excludable aliens, which had averaged close to 225 monthly prior to the new program, dropped to a monthly average of less than 40." Annual Report of the Commissioner of Immigration, included in the Annual Report of the Attorney General, 1956, pp. 407, 412.

* The allegation (R. 14) in the complaint of respondent Quan (R. 3) that he is "deportable *only* to Hong Kong which is the country from whence he came" (emphasis added) is a tacit admission that Section 237 (a) governs his case, not Section 243 (a) under which aliens may be sent to other countries.

basis of the record of proceedings conducted before a special inquiry officer (Section 236 (a)), with a right of appeal to the Attorney General, which appeal operates to stay any final action until the final decision of the Attorney General is made (Section 236 (b)), it is apparent that "immediate" departure under Section 237 will rarely occur in contested cases.

If the passage of time alone will cause an otherwise excluded alien to be considered "in the United States," one whose false claims to qualifying for entry require longer to disprove would be rewarded for his ingenuity. Haste will not always be in the best interests of justice, as, for example, where extensive field investigations are required. Especially where, as here, the delay in departure is not caused by, nor does it benefit, the government (see fn. 4, *supra*), is there lack of basis for the contention that the delay alone enhances an excluded alien's status.

For the fiscal year ended June 30, 1957, "907 aliens were formally excluded. There were also 156,352 aliens not admitted who, when advised of their inadmissibility by an immigration officer, did not apply for a formal exclusion hearing." Annual Report of the Commissioner of Immigration, included in the Annual Report of the Attorney General, 1957, p. 434. If the consequence of delay *per se* is to accord the alien a higher immigration status, one may reasonably expect the number of requests for a formal hearing to rise appreciably.

Ng Lin Chong v. McGrath, 202 F. 2d 316 (C. A. D. C.), upon which respondents rely, arose under the 1917 Act and is, we submit, erroneous. In any event that case is entirely distinguishable. There, the aliens, though subject to immediate return under Section 18, were detained so that they might be prosecuted. They could not, during that detention, have departed *even if they wished to leave*. For this reason, and others set forth more fully in our principal brief in No. 105, pp. 24-25, we do not believe the *Chong* decision furnishes a sound basis for holding Section 237 inapplicable here.

In short, the concept that an excluded but paroled alien is not deemed to be in the United States has been so long and well established as to constitute an axiom in the immigration laws of this country (see, *e. g.*, *Kaplan v. Tod*, *supra*). If it had been intended that a determination by the Attorney General that immediate deportation is not practicable or proper would improve the alien's status from that of an applicant for admission to that of an alien within the United States, one might reasonably expect Congress to have so stated. Instead, in Section 212 (d) (5) Congress has explicitly provided to the contrary.

II

THE FACT THAT SECTION 237 (a) PROVIDES FOR ALIENS "EXCLUDED UNDER THIS ACT" DOES NOT MAKE SECTION 243 (h) APPLICABLE TO THOSE RESPONDENTS WHO SOUGHT ENTRY PRIOR TO 1952

Section 237 (a) provides that an alien "*excluded under this Act*, shall be immediately deported * * *." Since four of the respondents (all but Yen Mok) sought entry prior to December 24, 1952 (the effective date of the Act, Section 407, 66 Stat. 281),⁹ those respondents assert that Section 237 cannot apply to them and that Section 243 (a) which provides for the "deportation of an alien in the United States provided for in this Act, or *any other Act*" must apply to them if there is to be any statutory authority to expel them. (Petitioner in No. 105, who sought entry in 1951 (R. 4), makes the same contention. Br. 24.) This argument ignores the fact that under both the 1952 Act and the

⁹ Only with respect to the respondent Lam Wing did the final exclusion order antedate December 24, 1952 (R. 15).

1917 Act these respondents were excludable and were subject to being sent back to the country from whence they came. In this regard the passage of the 1952 Act in nowise affected their status. Cf. *Shomberg v. United States*, 348 U. S. 540, 546. If not excludable under Section 237 (a) of the 1952 Act, respondents are excludable under Section 18 of the 1917 Act by virtue of the savings clause in the 1952 Act.¹⁰ Respondents suggest that there is a hiatus which only Section 243 (a) can fill. But surely Congress did not intend that on December 24, 1952, all those who had been found excludable under prior law and who continued to be excludable under the terms of the 1952 Act could not, in fact, be excluded but could only be deported pursuant to the deportation provisions of Section 243 (a). Nothing in the legislative history of the 1952 Act suggests that its passage was intended to remove all aliens ordered excluded up to December 23, 1952, from the

¹⁰ Section 405 (a) of the 1952 Act (the "savings clause") provides:

Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

category of excluded aliens and confer upon them the status of aliens who were within the United States. Respondents' argument seeks to prove too much. Since, for the reasons set forth in our principal brief in No. 105, at pp. 12-19, Section 243 (a) is limited to deportees not excludees, if respondents' argument were sound there would indeed be no statutory authority to return previously excluded aliens—a result which Congress clearly cannot have intended.

Nor does the fact that Section 243 (a) speaks of the "deportation of an alien in the United States provided for in this Act, or *any other Act or treaty*" indicate any legislative intent to broaden its scope to proceedings other than deportation. The legislative history indicates congressional concern with the fact that many aliens within the United States, long ordered deported, were still in the United States. The statutory scheme was changed to facilitate deportation of these aliens and to provide the alien with an opportunity to designate the country to which he would be sent. Because of the backlog of aliens ordered deported as long ago as 1928, Congress, of course, provided that Section 243 (a) should be applicable to those ordered deported under prior laws. (See principal brief for the United States in No. 105, pp. 14-17.) But from this it does not follow that *excluded* aliens (as to whom there was no mention in the legislative history of Section 243)¹¹ were also to be encompassed by that section.

¹¹ See *United States ex rel. Camezon v. District Director of Immigration & Naturalization at Port of New York*, 105 F. Supp. 32, 35-38 (S. D. N. Y.).

Moreover, even if subsection (a) of Section 243 were deemed applicable to aliens *excluded* under the prior Act, it is clear that subsection (h) can not be so construed. Section 243 (a) refers to "deportation of an alien in the United States * * *." In succeeding sentences in that subsection reference is made to "no alien" or "such alien."¹² But in subsection (h) of Section 243 the phrase used is "withhold deportation of any alien *within the United States*." The phrase "within the United States" would be either totally redundant or meaningless unless it had reference to the legal concept that an excluded alien, even though paroled, was not "within the United States."

¹² We note additionally that Section 243 (a) provides for deportation, among other places, "(1) to the country from which such alien *last entered* the United States; * * * (5) to any country in which he resided prior to entering the country from which he *entered* the United States; * * *." Subsection (c) of Section 243 contains the following language: "If deportation proceedings are instituted at any time within five years after the *entry* of the alien for causes existing prior to or at the time of *entry* * * *." (Emphasis added throughout.) Respondents concede (Br. 26), as indeed they must, that excluded aliens "may not be aliens who have 'entered' the United States (Cf. Section 101 (a) (13), 66 Stat. 167, 8 U. S. C. 1101 (a) (13)) so as to be subject to expulsion rather than exclusion proceedings (Cf. Section 236, 8 U. S. C. 1226 as opposed to Section 242, 8 U. S. C. 1252 (b)), or so as to be eligible for suspension of deportation (Cf. Section 244, 8 U. S. C. 1254), or so as to obtain the benefit of the running of a statute of limitations to preclude their deportation (Cf. *Kaplan v. Tod*, *supra*). We submit that an excluded alien has in no sense "entered" so as to be subject to Section 243 (a).

The concept that a paroled excluded alien is not within the United States is, of course, a legal fiction. Like other legal fictions, it is invoked because it serves a useful purpose—here, the purpose being not to require the physical detention of persons whose immigration status is in doubt: Respondents rely (Br. 27) on the fact that, for such purposes as alien registration and venue for the prosecution of a crime, an excluded alien is considered to be in the United States. Of course, because the concept of legal, but not physical, exclusion is a fiction, it must be disregarded where the context and common sense so require. The interpretation of the alien registration provisions and like examples cited by respondents demonstrate no more than this. However, where Congress, in a section of the Act which contains other indications that its application is limited to aliens who, in legal contemplation as well as in fact, are in the United States (see principal brief in No. 105, pp. 12–19), speaks of deportation “of any alien within the United States,” we submit that the phrase is used in its legal, rather than physical, sense. Obviously, “Congress cannot provide for the deportation of persons from one foreign country to another, and if the phrase “within the United States” is not intended to exclude from its application aliens who have been legally excluded from the United States it has no meaning. Here, the legal fiction must be recognized for it is invoked for the very purpose for which it was created—to enable an alien to be physically paroled without altering his immigration status.

III

THE PROVISIONS OF THE 1952 ACT GOVERN THESE APPLICATIONS FOR STAYS OF DEPORTATION

We have shown, *supra* at pp. 11-12 that the four respondents who sought entry prior to December 24, 1952, were excludable under either Section 237 (a) of the 1952 Act or Section 18 of the 1917 Act, which was continued in effect by virtue of the savings clause contained in Section 405 (a) of the 1952 Act. It matters not which section is deemed applicable for under either section respondents were subject to being sent back to the country from whence they came. These four respondents (except Yen Mok) argue that their applications for stays were also controlled by Section 20 of the 1917 Act, as amended by Section 23 of the Internal Security Act of 1950. See Resp. Br., pp. 4-5. Again, we believe the question to be largely academic for neither Section 20 of the 1917 Act nor Section 243 (h) has application to *excluded* aliens.¹³ However, Congress made its intent to limit the application of this relief provision only to aliens "within the United States" even clearer in the 1952 Act by using that precise term; and for purposes of clarifying the issues in this case, we discuss why the 1952 Act governs these applications for stays even though excludability may have been determined under the 1917 Act.

¹³ We discuss *supra*, p. 10, fn. 8, our reasons for believing *Ng Lin Chong v. McGrath*, 202 F. 2d 316 (C. A. D. C.), the only authority for the application of Section 20 of the 1917 Act to excluded aliens, to be both erroneous and distinguishable.

We note in the first instance that the respondents alleged below that they had requested relief under Section 243 (h) of the 1952 Act and made no reference to Section 20 of the 1917 Act (R. 2, 5, 9, 12). Thus, the question whether the Attorney General was required by Section 20 of the 1917 Act to entertain an application for a stay of deportation was not put in issue by respondents. Moreover, this proceeding is, in many respects, analogous to the filing of an application pursuant to Section 244 for suspension of deportation. An application for suspension of deportation filed under Section 244 is governed by the statutory law in effect at the time of such application, regardless of the statute under which the alien has been found deportable. This result is reached because an application for suspension of deportation is considered to be a proceeding separate and distinct from the original deportation proceeding. Cf. *Accardi v. Shaughnessy*, 347 U. S. 260, 261, note 1; *Ceballos v. United States*, 352 U. S. 599, 606. So, too, an application to the Attorney General for withholding of deportation upon the ground of physical persecution is governed by the statutory law in existence at the time it is filed because such application is a proceeding separate and distinct from the original exclusion proceeding. *United States ex. rel. Dolenz v. Shaughnessy*, 206 F. 2d 392, 394 (C. A. 2). In the instant case, respondents could not apply to the Attorney General to withhold their "deportation" until they were finally excluded from the United States.

As we have noted, *supra* (p. 11, fn. 9), of the four respondents who sought entry prior to December 24, 1952,

only as to respondent Lam Wing was a final exclusion order entered prior to the effective date of the 1952 Act, and, as to Wing, the record indicates that his application pursuant to Section 243 (h) was filed on June 20, 1955 (after the 1952 Act became effective) (R. 15). Therefore, regardless of which Act controlled the original orders of exclusion, it is clear that Section 243 (h) of the 1952 Act controls the applications for stays, all of which were made subsequent to the effective date of that Act.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in the Government's brief in *Leng May Ma v. Barber*, No. 105, this Term, and in the Government's principal brief herein, it is respectfully submitted that the judgment of the court below should be reversed.

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MAY 1958.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 396

WILLIAM P. ROGERS, ATTORNEY GENERAL,
Petitioner,

JIMMIE QUAN, ALSO KNOWN AS QUAN DUNG NGOON,
JOW MUN YOW AND JOW KWONG YEONG, YEN
MOK, AND LAM WING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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	Page
Statement	1
Question Presented	3
Statutes and Regulations	3
Summary of Argument	8
Argument	12
I. The Term Deportation in Section 243(H) Applies Both to Aliens Ordered Excluded and to Those Ordered Expelled	12
II. The Phrase "Any Alien" Includes Aliens Ordered Excluded From the United States	16
III. Aliens Who Have Been Paroled Into the United States Are "Within the United States" Within the Meaning of Section 243(h)	20
IV. There Are No Policy Considerations Which Restrict Stays of Deportation on Grounds of Physical Persecution to Expelled Aliens Only	32
V. Except for Yen Mok, the Respondents Are Governed by the Immigration Act of 1917 as Amended by the Internal Security Act of 1950	35
VI. The Issue of Parole Is Not Before This Court	36
Conclusion	39
Appendix	41

CITATIONS

Cases:	
<i>Barber v. Gonzalez</i> , 347 U. S. 637	25
<i>Brownell v. Tom We Skung</i> , 352 U. S. 180, 185	3, 9, 13
<i>Cheung Yau v. Rogers</i> , C. A. 37-56, U. S. District Court for the District of Columbia	38
<i>Chiu Yuan Ming v. Rogers</i> , C. A. 668-56, U. S. District Court for the District of Columbia	38
<i>Dennis v. United States</i> , concurring opinion, Frankfurter, J., 341 U. S. at 543	31

	Page
<i>Dodge Lu v. Rogers</i> , C. A. 3766-56, U. S. District Court for the District of Columbia	2
<i>Dong Wing Ott v. Shaughnessy</i> , 247 F. 2d 769, 770 (C.A. 2), petition for certiorari pending, No. 665, this Term	31
<i>Ekin v. United States</i> , 142 U.S. 651, 660, 662	10, 13, 20, 29
<i>Fon v. Rogers</i> , C. A. 2170-54, U. S. District Court for the District of Columbia	32
<i>Fong, Haw Tan v. Phelan</i> , 332 U. S. 6	18, 36
<i>Harisiades v. Shaughnessy</i> , 342 U. S. 580, 586	25
<i>Heikkila v. Barber</i> , 345 U. S. 229, 236	25
<i>Hom Dot Toy v. Rogers</i> , C. A. 372-54, U. S. District Court for the District of Columbia	38
<i>Jew Sing v. Barber</i> , 215 F. 2d 906, certiorari granted, 348 U. S. 910, judgment vacated as moot, 350 U. S. 898, No. 18, October Term, 1955	20, 32
<i>Johnson v. Eisentrager</i> , 339 U. S. 763	25
<i>Kaplan v. Tod</i> , 267 U. S. 228, 230, 231	11, 20, 26, 29, et seq.
<i>Knauff v. Shaughnessy</i> , 338 U. S. 337	22, 26
<i>Kiwong Chew v. Colding</i> , 344 U. S. 590, 600	25
<i>Lee Hong-Dick, et al. v. Rogers</i> , C. A. 5653-55, U. S. District Court for the District of Columbia	38
<i>Leng Ma May v. Barber</i> , No. 105, October Term, 1957, this Court	12, 37
<i>Leong Bing Ling v. Rogers</i> , C. A. 336-57, U. S. District Court for the District of Columbia	38
<i>Matter of Lee Sung</i> , A-7921505, Immigration and Naturalization Service	37
<i>Ng Lin Chong v. McGrath</i> , 91 U. S. App. D. C. 131, 202 F. 2d 316 (D.C. Cir. 1952)	15, 18, 20
<i>Pampanga Sugar Mills v. Trinidad</i> , 279 U. S. 211, 218	16
<i>Regina v. Bernard</i> , 8 State Trials, N. S. 1055, 61	34 Fn.
<i>Shaughnessy v. Mezei</i> , 345 U. S. 206, 10, 13 fn., 15, 19, 22, et seq.	
<i>Shomberg v. United States</i> , 348 U. S. 540, 547, Fn. 5	25
<i>United States v. Cores</i> , No. 455, October Term, 1957, this Court	28
<i>United States v. Ju Toy</i> , 198 U. S. 253	10, 20, 26, 29, 30
<i>United States v. Menasche</i> , 348 U. S. 528	12 Fn., 35
<i>United States v. Minker</i> , 350 U. S. 179, 185, 186	10, 17, 18

U. S. ex rel. Weinberg v. Schlottfeldt, 26 F. Supp.
283 (D. C. N. D. Ill. 1938) 33 Fn.

Wong Bing et al. v. Rogers, C. A. 2420-57, U. S. Dis-
trict Court for the District of Columbia 38

Statutes and Regulations:

8 Code of Federal Regulations, Sec. 175.57 (1952 Edi-
tion) 30

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eral Register, January 8, 1958, p. 142 8, 25

8 Code of Federal Regulations 212.9 (1952 Edition) 8, 25

8 Code of Federal Regulations, Sec. 237.1 (1952 Edi-
tion) 16

Immigration Act of 1917, 39 Stat. 874, as amended,
8 U.S.C. 132, et seq. (1946 Ed.):

Section 15 (8 U.S.C. 151) 19 Fn.

Section 18 (8 U.S.C. 154) 3, 4, 15

Section 20 (8 U.S.C. 156a) (1946 Ed. Supp. V),
4, 12 Fn., 35, 36

Immigration and Nationality Act of 1952, 66 Stat.
163, 8 U.S.C. 1101, et seq.:

Section 101(a)(4), (8 U.S.C. 1101(a)(4)) 23

Section 101(a)(13), (8 U.S.C. 1101(a)(13)) 26

Section 101(a)(15), (8 U.S.C. 1101(a)(15)) 23 Fn., 24

Section 211(a), (8 U.S.C. 1181(a)) 23, 26

Section 212(d)(3), (8 U.S.C. 1182(d)(3)) 23 Fn.

Section 212(d)(5), (8 U.S.C. 1182(d)(5)),
5, 20, 21, 23, 27

Sections 233(a) and (b), (8 U.S.C. 1223(a) and
(b)) 25, 26

Section 235, (8 U.S.C. 1225) 18, 35

Sections 236(a) and (b), (8 U.S.C. 1226(a) and
(b)) 13, 26

Sections 237(a), (b), (c) and (d), (8 U.S.C.
1227(a)(b)(c) and (d)) 6, 13, 14, 16, 17

Section 242, 8 U.S.C. 1252) 26

Sections 243(a), (b) and (g), (8 U.S.C. 1253(a)
(b) and (g)) 6, 14, 17, 19

Section 243(h), (8 U.S.C. 1253(h)) 7, 12, et seq.

Section 244, (8 U.S.C. 1254) 26

Sections 252(a) and (c), (8 U.S.C. 1282 (a) and
(c)) 28

	Page
Section 262, (8 U.S.C. 1302)	27
Section 265, (8 U.S.C. 1305)	27
Section 405(a), (8 U.S.C. 4101n)	7, 8, 12 Fn., 35
Passport Act, as amended, 22 U.S.C. 223	39
Public Law 85-316, 85th Congress, 71 Stat. 639	27
United States Constitution, Article III	28

Miscellaneous:

<i>Annals</i> , Francis Reinhold, "Exiles and Refugees in American History", May, 1939	34 Fn.
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Hearings, House Appropriations Committee, Department of Justice Appropriations, 85th Cong., 1st Sess., 1958, pp. 172-173	37 Fn., 38 Fn.
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H. R. 10 (S4037) 81st Congress	33

Immigration and Naturalization Service:

A-5986659, November 14, 1946 (Anderson Immigration Manual, 1946, p. 5170)	20
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Annual Report:

1951, p. 62	21
1953, p. 43	21, 22
1954, p. 37	22
1955, p. 6	22
1956, p. 6	22

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Form 220	27
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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BRIEF FOR RESPONDENTS

Statement.

Respondents are each natives of China who arrived in the United States variously from 1949 to 1954, four of them prior to December 26, 1952. (R. 2, 5, 12). They each were ordered excluded from the United States. Notwithstanding these orders they were paroled into the United States after varying intervals in detention. Yow and Yeong were paroled July 22, 1952, having arrived October 21, 1951;

(R. 5). Yen Mok arrived in December, 1954 and was thereafter paroled. Quan arrived in 1949 and Lam Wing in April, 1952, but the record does not disclose when either was paroled into the United States. Deportation of the respondents was not attempted until 1955. Each of the respondents alleged in complaints filed in the United States District Court for the District of Columbia that petitioner had designated Communist China as the place to which they were to be deported, and that he was threatening to deport them to Communist China by way of Hong Kong,¹ that the respondents had each applied for stays of deportation to that country upon the ground that if deported to Communist China, as anticommunists, they would be subject to physical persecution. Petitioner refused to consider the applications upon the ground that such claims may not be asserted in "exclusion cases." (R. 2, 6, 9, 13, 15). Quan also alleged that he had requested continuation of his parole in the United States and that the petitioner "arbitrarily and contrary to law refused to exercise discretion to permit (him) to remain in the United States." (R. 2)

The District Court dismissed the complaints both for lack of jurisdiction and for failure to state a claim upon which relief may be granted (R. 4, 8, 11, 16). The first ground

¹ Petitioner states (Pet. 4, fn. 2) that respondents were ordered excluded and deported to the place whence they came, Hong Kong. There is nothing in the record to support this. The allegations that the place of deportation is Communist China are undenied. Moreover, the Service has indicated its inability to deport excluded Chinese aliens, (see *Infra* at page 21) by its policy of paroling "nondeportable Chinese" into the United States after detention. Circular Letter (File 56204/81), March 29, 1950, Immigration Manual, p. 5170-1. The method of effecting deportation as to aliens treated under Section 243 of the Act is set forth in an affidavit of Frank H. Partridge, Assistant Commissioner, Enforcement Division, Immigration and Naturalization Service, which was filed by the petitioner in *Alfred Dodge Lu v. Rogers*, Civil Action 3766-56, in the United States District Court for the District of Columbia, and reproduced in the appendix herein at page 41. It is assumed that the same method is used for deporting excluded aliens to China.

was conceded to be error below following the decision of this Court in *Brownell v. Tom We Shing*, 352 U. S. 180. The second ground was set aside by the United States Court of Appeals for the District of Columbia Circuit in a holding that the respondents were aliens within the United States within the meaning of Section 243(h) of the Immigration and Nationality Act of 1952, 66 Stat. 212, 8 U.S.C. 1253. That Court did not decide the issues whether the four respondents who arrived in the United States prior to the 1952 Act were reached by Section 20 of the Immigration Act of 1917 as amended by Section 23 of the Internal Security Act (64 Stat. 1010, 8 U.S.C. 156), or whether, as to Quan, the refusal to exercise discretion under Section 212(d)(5) of the 1952 Act, 66 Stat. 188, 8 U.S.C. 1182(d)(5), states a cause of action.

Question Presented

Whether aliens who have been ordered excluded from the United States but who have been released from detention and have been paroled into the United States are aliens "within the United States" whose deportation may be withheld by the Attorney General to a country in which the aliens would be subject to physical persecution.

Statutes and Regulations

Section 18 of the Immigration Act of February 5, 1917 (39 Stat. 887; 45 Stat. 1551; 54 Stat. 1238; 8 U.S.C. 154), provides as follows:

"Immediate deportation of aliens brought in in violation of law; cost of maintenance and return.

"All aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class in which they arrived, to the country

whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessels on which they respectively came. It shall be unlawful for any master, purser, person in charge, agent, owner, or consignee of any such vessel to refuse to receive back on board thereof, or on board any other vessel owned or operated by the same interests, such aliens; or to fail to detain them thereon; or to refuse or fail to return them in the manner aforesaid to the foreign port from which they came; or to fail to pay the cost of their maintenance while on land; or to make any charge for the return of any such alien, or to take any security for the payment of such charge; or to take any consideration to be returned in case the alien is landed; * * *

Section 23 of the Internal Security Act of 1950 (64 Stat. 1010) amended section 20 of the Immigration Act of February 5, 1917 (8 U.S.C. 156) to read as follows:

"Sec. 20(a) That the deportation of aliens provided for in this Act and all other immigration laws of the United States shall be directed by the Attorney General to the country specified by the alien, if it is willing to accept him into its territory; otherwise such deportation shall be directed by the Attorney General within his discretion and without priority of preference because of their order as herein set forth, either to the country from which such alien last entered the United States or to the country in which such alien embarked for the United States or for foreign contiguous terri-

tory; or to any country in which he resided prior to entering the country from which he entered the United States or to the country which had sovereignty over the birthplace of the alien at the time of his birth; or to any country of which such alien is a subject, national or citizen; or to the country in which he was born; or to the country in which the place of his birth is situated at the time he is ordered deported; or, if deportation to any of the said foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory. . . . No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution."

Section 212(d)(5) of the Immigration and Nationality Act of 1952 [66 Stat. 188; 8 U.S.C. 1182(d)(5)] reads as follows:

"The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served, the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

Section 237 of the Immigration and Nationality Act of 1952 (66 Stat. 201; 8 U.S.C. 1227) reads as follows:

"Immediate deportation of aliens excluded from admission or entering in violation of law—Maintenance expenses.

"(a) Any alien (other than an alien crewman), arriving in the United States who is excluded under this chapter, shall be immediately deported to the country whence he came, in accommodations of the same class in which he arrived, on the vessel or aircraft bringing him, unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper. The cost of the maintenance including detention expenses and expenses incident to detention of any such alien while he is being detained, as well as the transportation expense of his deportation from the United States, shall be borne by the owner or owners of the vessel or aircraft on which he arrived"

Section 243 of the Immigration and Nationality Act of 1952 (66 Stat. 212; 8 U.S.C. 1253) provides as follows:

"Countries to which aliens shall be deported—Acceptance by designated country; deportation upon nonacceptance by country.

(a) The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States . . . Thereupon deportation of such alien shall be directed to any country of which such

alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

Withholding of deportation.

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

Section 405(a) of the Immigration and Nationality Act of 1952 (66 Stat. 280, 8 U.S.C. 1101 Note) provides in part:

“Sec. 405(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits,

actions, proceedings, statutes [statutes], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act, are, unless otherwise specifically provided therein hereby continued in force and effect."

8 Code of Federal Regulations §212.5 Provides: *Parole of aliens into the United States.* The district director in charge of a port of entry may, prior to examination by an immigration officer, or subsequent to such examination and pending a final determination of admissibility in accordance with sections 235 and 236 of the act and this chapter, or after a finding of inadmissibility has been made, parole into the United States temporarily in accordance with section 212(d) (5) of the act any alien applicant for admission at such port of entry under such terms and conditions, including the exaction of a bond on Form I-324, as such officer shall deem appropriate. At the expiration of the period of time or upon accomplishment of the purpose for which parole was authorized or when in the opinion of the district director in charge of the area in which the alien is located that neither emergency nor public interest warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he shall be restored to the status which he had at the time of parole, and further inspection or hearing shall be conducted under section 235 or 236 of the act and this chapter, or any order of exclusion and deportation previously entered shall be executed."

Summary of Argument

The issue here is whether the statutory authority reposed in the Attorney General to stay the deportation of an alien in the United States to a country in which he would be

subject to physical persecution applies to an alien who has been excluded from admission but who has been released from detention and has been paroled into the United States.

The statute by its express terms authorizes the Attorney General to withhold such "deportation of any alien within the United States".

Petitioner's argument that these words do not mean what they plainly say is derived principally from his view that Section 243 of the statute (in which the relevant clause appears) applies exclusively to aliens who are ordered expelled from the United States and that Section 237 sets forth the sole method of deporting excluded aliens.

That this cannot be so appears from the provisions of the two relevant sections. Section 237 provides only for the immediate deportation of excluded aliens and only for those aliens excluded under the Immigration and Nationality Act of 1952. Authority for the deportation of excluded aliens whose deportation has not been effected immediately, or who are excludable under other acts, must be sought in Section 243 where appear the only other provisions relating to methods of deportation. Contrary to petitioner's position, Section 237 cannot encompass all excluded aliens and Section 243 cannot be limited to expellable aliens.

The weakness of petitioner's position is made the more apparent by the methods of construction he must use to support it. He must explain away the use of the term *deportation* in Sections 237 and 243 to establish that its meanings in the two sections are different. If the meanings are the same, there is no basis in the statutory language for his argument. Petitioner therefore says that in Section 237, the term *deportation* is used in a colloquial sense, but in Section 243, in a technical and legal sense. His method here is contrary to the teaching of *Brownell v. Tom He Shung*, 352 U.S. 180, 185, in which "chameleonic" definitions were rejected as to another word in the same statute.

Petitioner must also substitute the word "chapter" for the statute's use of the language "in this Act or any other Act or treaty" in order to sustain his argument that Section 243 applies solely to expellable aliens. Petitioner's word "chapter" would limit Section 243 to aliens deported after expulsion proceedings. The statute's phrase, however, clearly includes aliens who are deported after orders of exclusion. Petitioner's device here, scarcely one to be justified under any principle of statutory construction, has specifically been refused acceptance as to this statute in *United States v. Minker*, 350 U.S. 179, 185, 186.

Petitioner's third problem is to place the respondents outside of the United States although they have been paroled physically into this country after being released from detention at ports of entry. This he solves by imparting a meaning to the parole provisions of the statute, Section 212(d)(5), which it does not have, and by resort to a legal fiction which he says is justified by decisions of this Court.

The parole provisions of the statute provide that parole shall not be regarded as admission into the United States. Petitioner argues that this precludes treatment of the respondents as being physically within the United States. It suffices to say that physical presence at the United States is not equivalent to admission, a response which is borne out by the specific requirements which must be met before an alien can be admitted. (Cf. Section 211(a)). Those requirements bear no relation to the issue whether aliens are "within the United States".

The reliance which the petitioner has placed upon the decisions of this Court, respondents believe, is misplaced. Three of the decisions, *Ekiu v. United States*, 142 U.S. 651, *United States v. Ju Toy*, 198 U.S. 253, and *Shaughnessy v. Mezei*, 345 U.S. 206, involved aliens who were in detention at the threshold of entry and who had been denied permission to land. The issues were whether the procedures

authorized by Congress were due process. Here the aliens have been denied admission, but not permission to land for they have been released from detention at ports of entry and have been paroled into the United States. Thus the posture of the aliens is far different and the issue to be decided is far simpler than in the cases cited by petitioner.

The fourth case, *Kaplan v. Tod*, 267 U.S. 228, posed questions of statutory construction different from those here. One was whether a person was "dwelling" in the United States so as to acquire citizenship although inadmissible as a legally landed immigrant. The second was whether such a person, who had been paroled into the United States because of inability to effect deportation, had "entered" and was "found" in the United States in violation of the immigration laws so as to obtain the benefit of a statute of limitations barring deportation. Neither question bears on the issue here where the sole relief sought is respite not from deportation itself but from deportation to a country where respondents will be subject to physical persecution.

Policy considerations, which have been posed by the petitioner, do not bar the respondents from this relief. Excluded aliens may well have as long a residence in the United States and as much identification with its institutions as expelled aliens. Moreover, the traditions of political asylum are deeply-rooted in American history.

The four respondents who arrived in the United States prior to the Act of 1952, in any event, are governed by the provisions of Section 23 of the Internal Security Act, if their applications for stays of deportation are not authorized under the 1952 Act. That Act, which has no requirement that the aliens be "within the United States", includes excluded aliens because they are deportable under "any provision of the Act".

ARGUMENT

The issue here, as petitioner states (Gov't, 11) ² is wholly one of statutory construction. The statute ³ to be construed authorizes the Attorney General

“to withhold *deportation of any alien within the United States* to any country in which . . . the alien would be subject to physical persecution . . .” (Italics supplied)

The precise questions to be resolved, therefore, are (1) whether the term *deportation* includes aliens deportable under orders of exclusion as well as those under orders of expulsion; (2) whether the phrase *any alien* encompasses an alien ordered excluded as well as one ordered expelled, and (3) whether an alien who has been “paroled into the United States” is an alien *within the United States* for the purpose of securing a stay of deportation upon the ground of physical persecution.

I

The Term Deportation in Section 243(H) Applies Both to Aliens Ordered Excluded and to Those Ordered Expelled.

As to the first question, petitioner urges that the term *deportation* is used “in the colloquial sense” when applied

² Petitioner's argument is set forth in his brief as respondent in the companion *Leng Ma May* case, No. 105. References to “Gov't” are to that brief.

³ Four of the respondent aliens arrived in the United States prior to the effective date of the Immigration and Nationality Act of 1952. Their applications for stays of deportation, respondents urged below, were governed by Section 20 of the Immigration Act of 1917, as amended by Section 23 of the Internal Security Act of 1950, 64 Stat. 1010, 8 U.S.C. 156, by reason of the savings clause contained in the 1952 Act, 66 Stat. 280, 8 U.S.C. 1101 Note. See *United States v. Menasche*, 348 U.S. 528. The Court below apparently felt it unnecessary to reach that issue in view of its construction of the 1952 Act and its application to the respondents.

to exclusion, but in a "legal and technical sense" when applied to expulsion. (Gov't. 13). His argument is that the difference in meaning is justified by the legal distinction between exclusion and expulsion⁴ and that the two processes are structurally delineated in different chapters of the Immigration and Nationality Act. (Gov't. 13, 14)

The short answer to this proposition is given in *Brownell v. Tom We Shung*, 352 U.S. 180. In response to the identical argument made there to support divergent meanings for the word *final* in exclusion and in expulsion proceedings, the Court replied:

"But to darken the meaning of the word "final" as used by Congress by giving it chameleonic characteristics is to indulge in chop logic." (P. 185)

Nowhere in the Act, or in its legislative history, is there any suggestion that the term *deportation* takes on any meaning different for excluded aliens than for those expelled. As the Court below pointed out (R-19), the very section of the statute which gives the Attorney General the authority to exclude also gives him the power to deport an alien⁵ by the use of the verb *deport*. Section 236(a), 66 Stat. 200, 8 U.S.C. 1226(a).

The term *deportation* first appears in the statute at Section 237(a), 66 Stat. 201, 8 U.S.C. 1227(a). That section provides that an alien "who is excluded under this Act shall be immediately deported to the country whence he came . . . unless the Attorney General concludes that *immediate*

⁴ Whether the distinctions between exclusion and expulsion are what they were in 1892 when *Ekin v. United States*, 143 U.S. 651, was decided is not as certain as petitioner suggests. See Note 1, *Brownell v. Tom We Shung*. In any event, the differences are not relevant to this case for we are concerned not with whether the procedure authorized by Congress is due process, but rather with what Congress authorized.

⁵ This Court learned that the power to exclude is not always the ability to deport in *Shanghnessy v. Mezei*, 345 U.S. 206.

deportation is not practicable or proper." (emphasis supplied)

The identical word is used again at Section 243, 66 Stat. 214, 8 U.S.C. 1253, with nothing to indicate that its meaning is different, legally, technically, or colloquially. The sole difference in the use of the term *deportation* in Section 237 from that of Section 243 is derived not from nuance, but from the omission in Section 243 of the adjective *immediate*.

The significance of the two sections, as appears from its provisions, is twofold. First, it is to direct the immediate deportation of an excluded alien, with discretion reposed in the Attorney General, however, to delay deportation when not "practicable or proper." Second, it is to differentiate the method of deporting an excluded alien who is deported immediately from the manner of deporting *any* alien whose deportation is not accomplished forthwith.

The directive in Section 237(a) links immediate deportation to "the country whence (the excluded alien) came . . . on the vessel or aircraft bringing him . . .". This is to be compared with the provisions of Section 243(a) which permit deportation to any country of the alien's choice (with exceptions), or to that of his place of birth, residence, or citizenship, as well as to the country from which he came.

The reasons for requiring deportation to the country whence the alien has come when deportation is immediate, but permitting latitude when deportation is delayed, are not hard to find. For where there is immediate deportation, the alien presumably has the same ability to re-enter the country whence he came as he had in the first instance to enter it. It is the country, in any event, in which he has had his most immediate nexus, the country, which as a

passer of an unwanted alien, to which the United States would look for redelivery.

But in the interval between ~~immediate and delayed~~ deportation (in the present cases, the delay between arrival in the United States and the attempt to deport extended for as much as six years. See Complaint of Jimmie Quan, R. 2, 3), many considerations may arise to thwart the return of an excluded alien, not the least of which is the sheer refusal of the country to accept the alien. See Reciprocal Arrangement of 1949, United States and Canada, on file, Central Office, Immigration and Naturalization Service, Washington, D. C.

The problems which the petitioner has detailed in his recital of the legislative history of Section 23 of the Internal Security Act, *supra*, (Gov't. 14-17) pertain no less to aliens who are deportable because they have been excluded than they do to those who are deportable because they have been ordered expelled. See *Shaughnessy v. Mezei, supra*. Thus there is clear warrant in the legislative history of the predecessor clause of Section 243, contrary to the viewpoint of the petitioner, for finding that its provisions apply also to deportations of those excluded aliens who are not immediately deported.

Indeed, as the District of Columbia Circuit found in construing the predecessor clause in Section 18 of the Immigration Act of 1917, 39 Stat. 887, 8 U.S.C. 154, far from being the exclusive statutory authority for deporting excluded aliens, Section 18 provides only for such deportation when it is immediate. When deportation is not immediate, the statutory authority must be found elsewhere. In the 1917 Act, the District of Columbia Circuit found it in Section 20. *Ng Chong v. McGrath*, 91 U. S. App. D. C. 131, 202 F. 2d 316 (D. C. Cir. 1952). A fortiori, in the 1952 Act, it is in Section 243.

The term *deportation* therefore necessarily carries the same meaning wherever it appears in the statute, particularly in an act which seems singularly free from colloquial language. In the absence of an express qualification, not present here, the same words in different parts of a statute are assumed to have the same meaning throughout. *Pam-panga Sugar Mills v. Trinidad*, 279 U. S. 211, 218.

Moreover, petitioner's own regulations reflect the same usage of the term as the Court below adopted. For as that Court stated, Section 237.1, Title 8, Code of Federal Regulations (1952) refers to the "immediate deportation of an excluded alien," and a "determination that immediate deportation is not practicable or proper", while the part is itself entitled "Deportation of Excluded Aliens".

In view of the foregoing, the conclusion must be inescapable that the term *deportation*, as used in Section (243(h)), includes both excluded aliens and aliens ordered expelled.

II

The Phrase "Any Alien" Includes Aliens Ordered Excluded from the United States

Petitioner's answer to the second question—whether the phrase *any alien* in Section 243(h) includes excluded aliens—rests upon the same ground as his treatment of the first question. He suggests, as we have noted, that Section 237 provides the exclusive method for removing excluded aliens from the United States, while Section 243 is exclusively for expelled aliens. (Gov't. 13, 14)

That the petitioner's contention is incorrect is shown by the explicit language contained in the two sections.

Section 237(a) expressly limits immediate deportation to

any alien "who is excluded under *this Act*." (Italics supplied). By its terms, therefore, Section 237 cannot be made to reach aliens who have, as have four of the respondents, been excluded under other *Acts*. It is Section 243(a) which reaches those aliens, if they are in the United States, a point which we discuss below. For it provides:

"The deportation of an alien in the United States provided for in this Act, *or any other Act or treaty* shall be directed by the Attorney General . . ." (Italics supplied).

Contrary to petitioner's argument, Section 243 cannot be limited to expelled aliens, for it is the very source of the authority to deport aliens who have been excluded under other acts or treaties.

Moreover, the statute makes it clear in other clauses that the phrase *any alien* in Section 243 is not confined to aliens ordered expelled, and that Section 237 is not comprehensive as to all excluded aliens.

For example, Sections 237 (b) and (c) refer to "any alien deported under this section", which requires immediate deportation. Subsection (d) similarly refers to "any alien deportable under this section".

Section 243(a), on the other hand, refers to the deportation of "an alien in the United States (which is) provided for in this Act, *or any other Act or treaty*." Subsection (b) refers to "any alien who is deportable under any law of the United States."

The decision of this Court in *United States v. Minker*, 350 U. S. 179, 185, 186, respondents believe, has foreclosed this aspect of petitioner's argument. In resolving the

⁶ The four respondents who arrived prior to December, 1952, were not excluded under "this Act", the Immigration and Nationality Act of 1952, but under the Act of 1917. (R. 2, 5, 12)

question whether the subpoena power contained in the present Act at Section 235 in Title II, relating to immigration, extends to investigations under Title III, relating to naturalization, the Court declared:

"Throughout this statute, the word 'Act' is given its full significance. The word embraces the full statute. On the other hand and when only a particular title is referred to, it is designated, as such, and when the reference is to a section, that word is employed. No justification appears for treating 'Act' in Section 235 —as meaning section."

Nor does any justification appear here. Had Congress chosen to limit the operation of Section 243 to aliens who are ordered deported under the provisions of Chapter 5, the limiting word "chapter" would have been used, rather than the all-encompassing phrase, "in this Act, or any other Act or treaty", or the phrase, "under any law of the United States".

The force of this argument, it should be noted, has been recognized by the petitioner. He states (Gov't. 35) "If the *Ng Lin Chong* decision can be justified at all, it is only on the basis of ambiguities (Cf. *Fong Haw Tan v. Phelan*, 333 U. S. 6) (citation supplied) in the prior statute. . . . The earlier provision referred to deportation "under any provisions of this *chapter*; and the chapter included exclusion provisions as well as those pertaining to deportation proper".

Although Section 243(h) replaced the *chapter* phrase with "within the United States," it can scarcely be maintained that new language is more limiting than the old. In any event, the rationale of the petitioner's concession vitiates his contention (Gov't. 14) that Section 243(h) is

"the last subdivision of a . . . section which . . . was obviously not intended as a directive applicable to excluded aliens."

That Section 243 is concerned with excluded aliens is indicated also by the phrasing of 243(g). It provides for specified sanctions against any country which refuses to accept the "return of any alien who is a national, citizen, subject or resident thereof . . ." The word "return" coupled with the phrase "any alien", it cannot be disputed—especially not by the petitioner in view of his predecessor's experience with the excluded alien in *Shaughnessy v. Mezei*,⁷ *supra*—includes the "physical transportation" (Gov't. 12) of both excluded and expelled aliens out of the United States.

As the last subdivision of a section which is replete with indications that it is designed to encompass the deportation of *any* alien deportable under *any* statute, the context of Section 243(h) alone indicates that it is intended to include excluded aliens.

But apart from all of the considerations which we have discussed, respondents submit that the phrase "any alien", standing alone in Section 243(h) is broad enough to bring excluded aliens within its reach. If there is doubt about its breadth then the very doubt makes it ambiguous, a factor which would resolve the doubt in respondents' favor. *Fong Haw Tan v. Phelan, supra*; *United States v. Minker, supra*.

⁷ Attempts were made there to deport an excluded alien (who had not been permitted to land but who was temporarily removed and detained at the port of entry (See Section 15, Immigration Act of 1917, 39 Stat. 885 as amended, 8 U.S.C. 151)) to France, whence he had debarked and so "may have come", to the United Kingdom, in which he claimed to be a national, and to Hungary, where he had visited and whence, therefore, he may have come and where he may have had citizenship. (208, 209)

III

**Aliens Who Have Been Paroled Into the United States Are
"Within the United States" Within the Meaning of Sec-
tion 243(h).**

Petitioner's final argument is that the respondents are not "in the United States" within the meaning of Section 243(h). It is based upon three grounds: (A) that respondents were permitted to remain here on sufferance for their own benefit, (B) that the provisions of 242(d)(5), 66 Stat. 198, 8 U.S.C. 1225, dictate the conclusion that the respondents "in legal contemplation" are not within the United States, and (C) that the rulings of this Court in *Kaplan v. Tod*, 267 U. S. 228; *United States v. Ju Toy*, 198 U. S. 253, and *Ekiu v. United States*, *supra*, even without the statute, hold that mere physical presence in the United States does not change the status of an alien applying for admission.

We deal with these contentions seriatim.

(A) The suggestion that respondents were paroled into the United States on sufferance for their own benefit is not supported by the record in this case. For all that appears, the respondents might have been paroled into the United States, as was Jew Sing (*Sing v. Barber*, 215 F. 2d 906, certiorari granted, 348 U. S. 910, judgment vacated as moot, 350 U.S. 898 in No. 18, October Term, 1955 of this Court) in order to be naturalized as a United States citizen or as were the aliens in *Ng Lin Chong v. McGrath*, *supra*, to be prosecuted for making false claims of citizenship and thereafter to be sentenced to imprisonment, or as was the alien in A-5986659, Immigration Naturalization Service, November 14, 1946 (Anderson), for the purpose of rejoining his unit as a member of the United States Armed Forces (See Immigration Manual, Immigration and Naturalization Service, 1946, p. 5170), or for "such

other exceptional (reasons for) which to do otherwise would be inhuman or hold the Service up to ridicule", *ibid*, at 5169-70; or in order to be granted "political asylum". (See White House Statement, December 2, 1956 regarding Hungarian escapees, New York Times p. 36, cols. 3 and 4); or for any other reason regarded by the petitioner as emergent or in the public interest. Cf. Section 212(d)(5) *supra*.

What we know as to the reasons for paroling aliens, who are in the respondent's position, that is, who are Chinese-nationals who have been ordered excluded from the United States, we glean from the annual reports of the Immigration and Naturalization Service, and from a Circular Letter of the Service.

In its Circular Letter (File 56204/81, March 29, 1950), Immigration Manual, *supra*, at p. 5170.1, the Service authorized "until further notice, the parole of certain non-deportable (sic) Chinese excluded by a board of special inquiry".

The following year, in Annual Report of 1951, the Service reported at page 62 that "Travel documents for China and the iron-curtain countries of Europe are practically impossible to obtain".

By 1953, the Service had "an accumulation of 600 Chinese under orders of deportation because of inability to procure travel documents for deportation to China". *Annual Report, 1953*, p. 43.

At the same time, the Service reported that:

"... Chinese aliens who were excluded . . . upon seeking admission to the United States not only comprised the largest group of aliens held in the San Francisco detention facility, but remained longer than any other group . . . As a result, there were many unusual problems relating to their care and treatment, in-

cluding the necessity of providing separate living quarters and a special diet." p. 46

In 1954, the Annual Report noted: "In San Francisco protests relative to the care and treatment of Chinese aliens in detention have virtually disappeared." p. 37

In 1954, however, the policy of the Service regarding detention and parole underwent a major change. The 1955 Annual Report states:

"Detentions of aliens were at the lowest figure in the history of the Service at the close of 1955. This was accomplished through a new detention policy begun in November, 1954, under which only those aliens likely to abscond and those whose release would be inimical to the national security are detained . . .". p. 6.

By 1956, the Service was able to report (Annual Report, 1956, page 6) that the detention of excludable aliens "which had averaged close to 225 monthly prior to the new program, dropped to a monthly average of less than 40".

Petitioner's argument that the respondents should not obtain any benefit by reason of their physical presence in the United States because their presence by parole has been by sufferance and for their own benefit is thus supported neither by the record below nor by the available information. To the contrary, in the light of the inability to the Service to obtain travel documents to China, the special problems of housekeeping involved for Chinese aliens in detention, and its determination to keep in custody only potential absconders and security risks, the physical presence of the respondents in the United States, as distinguished from their detention at a port of entry (Cf. *Knauff v. Shaughnessy*, 338 U. S. 537, and *Shaughnessy v. Mezei*, *supra*), would seem to be as much for the benefit of the petitioner, as it might have been for respondents.

(B) The defect in the petitioner's second contention is that the language of Section 212(d)(5) bars treatment of the respondents as aliens who are within the United States—appears from the very clauses he has chosen to emphasize. (Gov't. 20).

Parole, petitioner emphasizes first, shall not be regarded as an *admission* of the alien. From this language, it is argued, respondents' physical presence cannot transform their "status in any respect", "in legal contemplation" they are not within the United States, and they are not "entitled to special treatment". (Gov't 19, 20).

Petitioner has failed to note the proper significance of the word *admission* which derives from precise and explicit requirements elsewhere in the statute. At chapter 2—"Qualifications for Admission of Aliens," Section 211(a), 66 Stat. 181, 8 U.S.C. 1181(a), provides that "no immigrant" shall be *admitted* into the United States unless at the time of application for admission, Cf. Section 101(a)(4), 66 Stat. 166, 8 U.S.C. 1101(a)(4); he meets specified conditions.¹⁰

Clearly, the purpose and the effect of the word *admission* in 212(d)(5) is to bar treatment of an alien who has been paroled into the United States as one who has met the admission demands of Section 211(a), and by reference, the requirements also of Chapter 3, 66 Stat. 191, 8 U.S.C. 1201;

⁸ It should be noted that two of the respondents were paroled into the United States prior to the 1952 Act. (R. 5); one was paroled afterward. (R. 9). The Record is not clear as to the remaining respondents.

⁹ Aliens who are nonimmigrants must meet the requirements of section 101(a)(15), 66 Stat. 167, 8 U.S.C. 1101(a)(15). Note Section 212(d)(3), 66 Stat. 187, 8 U.S.C. 1182(d)(3), which permits *admission* of nonimmigrants despite inadmissibility.

¹⁰ The conditions include possession of valid immigrant visa, being properly chargeable to the specified quota and to the proper status under the quota, unless a nonquota immigrant, and being "otherwise admissible under this Act".

relating to the issuance of valid immigrant visas, if the alien is an immigrant, or the requirements of Section 101 (a)(15) if the alien is a non-immigrant.

Petitioner's attempt to equate physical presence with admission into the United States thus cannot be supported by the kind of analysis which the statutory language requires. Reliance upon such phrases as "special treatment", or "transform(ed) status", or "in legal contemplation (not being) within the United States" cannot resolve the question whether the respondents are within the United States for the specific purpose of securing a stay of deportation to a particular country upon the ground of possible physical persecution.

The second clause which the petitioner emphasizes provides that when the purposes of the parole have been served, the alien shall be returned to the custody from which he was paroled and "*thereafter* (emphasis supplied) his case shall continue to be dealt with in the same manner as that of any other applicant for admission".

Respondents emphasize the word *thereafter* because the plain meaning of the clause indicates that it is only *after* the alien has been returned to his former custody that he shall be treated in the same manner as any other applicant for admission. It may well be, if this Court is to adhere to its decision in such cases as *Knauff*, *supra*, and *Mezei*, *supra*, that after the respondents are returned to custody, they will not be "within the United States". But that issue cannot be reached unless there is a return to custody, a factor not present here.

Respondents suggest that the petitioner may well concede the validity of their position as to this issue in view of a recent amendment of the relevant regulations.¹¹

¹¹ Petitioner's brief is dated March, 1958, and its authors may have been unaware of the change in regulations.

On January 8, 1958, 8 C.F.R. 212.5 was amended to provide inter alia: (Federal Register, pp. 140, 142)

“ . . . Parole shall be terminated upon written notice to the alien and he shall be *restored to the status* which he had at the time of parole, and further inspection or hearing shall be conducted under Section 235 or 236 of the Act and this Chapter, or any order of exclusion and deportation previously entered shall be executed.”

The prior regulation, in addition to its differences in other ways, adhered to the statutory phrase *return or be returned to custody* in place of the newly-adopted “restored to status” clause. 8 C.F.R. 212.9, (1952 Ed.)

In his own regulations, therefore, the petitioner recognizes that there is a “transformation of status”, a transformation, true enough, which may be undone by a “restoration” to a prior status. An excluded alien, thus may have the status of an alien who has been temporarily removed and held in custody at a place of detention (Cf. Section 233, 66 Stat. 197, 8 U.S.C. 1223), or the status of one who has been paroled into the United States. The first may bar presence in the United States; the second does not.

The nature of status, of course, is varied, perhaps as varied as are the many postures of aliens in (or out of) the United States. There is status as an alien, *Harisiades v. Shaughnessy*, 342 U. S. 580, 586; as a nonresident enemy alien, *Johnson v. Eisentrager*, 339 U. S. 763; as a resident enemy alien, *Shomberg v. United States*, 348 U. S. 540, 547, fn. 5; as an alien who has entered the United States as a national, *Barber v. Gonzalez*, 347 U. S. 637; as an alien eligible for citizenship, *Heikkila v. Barber*, 345 U. S. 229, 236; as a resident alien physically present in the United States (notwithstanding detention at the threshold of entry), *Kwong Chew v. Colding*, 344 U. S. 590, 600; and as

an excluded alien who has not been permitted to land, *Kauf v. Shaugnessy*, *supra*, and *Shaugnessy v. Mezei*, *supra*.

In the case of aliens who have been ordered excluded, but who have been paroled into the United States (as distinguished from being temporarily removed from a vessel to a place of examination or detention, See Section 233(a) and (b), *supra*), very plainly a status is conferred upon them as aliens who are "within the United States".

The rights they have may be limited. They are not "admitted aliens". (Cf. Section 211(a), *supra*). They are not aliens who are "dwelling" in the United States so as to be eligible for citizenship. (Cf. *Kaplan v. Tod*, *supra*). They may not be aliens who have "entered" the United States (Cf. Section 101(a)(13), 66 Stat. 167, 8 U.S.C. 1101(a)(13)) so as to be subject to expulsion rather than exclusion proceedings (Cf. Section 243, 8 U.S.C. 1226 as opposed to Section 242, 8 U.S.C. 1252(b), or so as to be eligible for suspension of deportation (Cf. Section 244, 8 U.S.C. 1254); or so as to obtain the benefit of the running of a statute of limitations to preclude their deportation (Cf. *Kaplan v. Tod*, *supra*). And no claim is made that they are aliens who have a "right to enter", either while their "right to enter" is under debate, *United States v. Ju Toy*, *supra*, or until arrangements can be made for departure, *Shaugnessy v. Mezei*, *supra*.

But that they are aliens who are "within the United States" cannot be doubted. That status itself, without more, is sufficient to confer upon them the limited benefits of Section 243(h), that is, eligibility which Congress has authorized for stays of deportation to a particular country upon ground of physical persecution. This confers no right to remain in the United States, nor even a right not to be deported to another country, but merely the narrow statu-

tory right to avoid deportation to a country in which the aliens would be subject to physical persecution.

The Immigration and Naturalization Service has interpreted Sections 262 and 265 of the Act (8 U.S.C. §302, 1305), which refer to "every alien now or hereafter in the United States" and "who is within the United States", so as to require aliens who are paroled under Section 212(d) (5)¹² to be fingerprinted, registered, and to provide notices of changes of address. (Italics supplied). See Immigration Form 220.

It should be noted that Congress also in subsequent legislation has regarded persons paroled into the United States as being "within the United States". Public Law 85-316, 85th Congress, 71 Stat. 639 provides at Section 4(d) that "an alien who was paroled into the United States under Section 212(d) (5)" may have his status adjusted to that of a lawful permanent resident if "at the time of his arrival in the United States (he) was an eligible orphan . . . and was, or thereafter has been, adopted by the United States citizen and spouse in a court of proper jurisdiction."

By its reference to a "court of proper jurisdiction" as to orphans who have been adopted after arrival in the United States, Congress clearly contemplated that aliens who are paroled into the United States are within its borders, for without such presence there could be no courts of competent jurisdiction to enter adoption decrees for eligible orphans. See *Vernier, American Family Laws*, Vol. IV, pp. 293-4.

In view of the use in Section 212(d) (5) of the word *admission*, the statutory language involved in *United States*

¹² Excluded aliens who are detained are not required to register under Section 262 and have no occasion to under Section 265. Of course, excluded aliens who commit crimes here are considered within the United States for purposes of criminal prosecution.

v. *Cores*, which is presently pending before this Court, No. 455, October Term, 1957, may also be of some significance. There, an alien crewman who had been "permitted to land temporarily in the United States" (Section 252(a), 66 Stat. 220, 8 U.S.C. 1282) was charged in a criminal proceeding with willfully remaining "in the United States". Section 252(c).

In his Brief in this Court, the case being here on a question of venue under Article III of the Constitution, the Solicitor General concedes that the alien crewman (who had been *temporarily landed but not admitted*) "has the constitutional right to a jury trial 'in the State' and 'district wherein the crime shall have been committed'." (Brief, p. 14, and fn. 8, p. 16 citing *Wong Wing v. United States*, 163 U. S. 228).

These three applications of the phrase (*with*) *in the United States*, one by the Service, one by Congress, and the third by the Solicitor General, each treat aliens who have not been *admitted* to the United States (in two instances, aliens who have also been ordered excluded) as being in the United States within the contemplation of a specific law. The caution which this Court uttered in *Brownell v. Tom We Shung, supra*, against chameleonic usage of statutory language seems pertinent here. For if these aliens, two of them excluded and paroled and the third without the status of an admitted alien, are to be regarded as being in the United States, the suggestion that Congress intended respondents to be treated under a legal fiction, as being outside the United States, must be justified with more support than the petitioner has offered.

In view of the foregoing considerations, respondents submit that there is no language in Section 212(d)(5) which dictates the conclusion that paroled excluded aliens are not within the United States. Rather, the contrary is so.

(C) For his third contention, petitioner states that "Decisions of long standing have settled the principle that mere physical presence within the boundaries of this country does not change the status of an alien applying for admission". (Gov't 21)

The error in the formulation of the issue here as one of status in applying for admission has been discussed above. But because petitioner relies so heavily upon language in *Kaplan v. Tod*, and the decisions in *Ekiu v. United States*, *United States v. Ju Toy*, and *Shaughnessy v. Mezei*, we believe it appropriate to review those decisions and to show that they do not control the issue here.

The question in *Ekiu* was whether the alien's admitted right to challenge the lawfulness of her detention in a habeas corpus proceeding carried with it as a right of due process a judicial determination of the factual issues as to her excludability. The statute vested those issues exclusively with executive officers. This Court upheld the power of Congress to vest factual determinations exclusively with the executive as being coequal with its power to vest the determination in courts (660). The decisions of such officers, the Court stated, in celebrated and oft-repeated language, "*acting within powers expressly conferred by Congress are due process of law*" (669). That her detention was in a mission house, rather than on a steamship, left her "right to land in the United States as if she had never been removed from steamship." ¹³ (662)

In *Ju Toy* the question was identical. Its difference from *Ekiu* was in that the fact for which judicial determination was sought was Ju Toy's claim to be a citizen, rather than, as *Ekiu*, the wife of one. The Court held that this difference did not distinguish the case. Finality of administra-

¹³ Section 8 of the relevant statute provided that "such removal shall not be considered a landing". *Ekiu v. United States*, fn. at 653.

tive determinations of fact, absent allegations of abuse of authority (260-261), applies to all facts, domicile, citizenship, or exceptions to excluded classes. (262)

In *Mezei*, the question was the right of an excluded and indefinitely-detained alien to a hearing when the executive officers determined that to give one would be prejudicial to the public interest. This Court found that the denial of a hearing was a procedure authorized by Congress (210, 211). (Passport Act of 1918, as amended, 22 U.S.C. 223, as implemented by 8 C.F.R. 175.57); and therefore due process as to an alien denied entry. Mezei's temporary harborage at Ellis Island, like Ekin's detention at a mission house, gave the alien no greater right to have the "courts retry the determination of the Attorney General" inasmuch as "Congress meticulously specified that such shelter ashore shall not be considered a landing." (215)

Ekin, Ju Toy, and Mezei therefore concern the constitutional rights of due process as to excluded aliens who were held in detention at the port of entry. The aliens there challenged the procedures which Congress had authorized as being violative of due process. Respondents here seek only to determine what Congress has authorized, a far different, a far easier question.

Kaplan v. Tod, although before this Court in a context in which due process rights were in question, posed two issues each of statutory construction. The first was whether an excluded alien whose deportation had been suspended because of World War I and who was transferred to the custody of an immigrant aid society "dwelt within the United States" within the meaning of a naturalization statute so as to have acquired citizenship. The second question, if alien were not dwelling in the United States, was whether she had entered or was "found in the United States in violation of immigrant authorities", (230, 231) so as to

have obtained immunity from deportation under a five year statute of limitations.

The issue, here, of course, is not whether respondents are *dwelling* in the United States, or whether they have *entered*, or whether they are *found here in violation of immigration laws*. Nor, if statutory construction is to be related to the congressional purpose, can the respondents, who seek only a stay of deportation to a country in which they believe they will be subject to physical persecution, be assimilated to the status of a person who claims citizenship or the right to remain in the United States permanently.

If *Kaplan v. Tod* has "continuing vitality" (*Dong Wing Ott v. Shaughnessy*, 247 F. 2d 769, 770 (C.A. 2) petition for certiorari pending, No. 665, this Term), it is not sustained by transplanting its concepts mechanically to any situation involving excluded aliens. As we have observed above the posture of the alien, the questions posed, and the statutory language are what bear on the issue. Manifestly, whether an alien is "in the United States" for the purpose of securing relief from deportation to a particular country is not inexorably governed by the same consideration which determines whether an alien is dwelling in the United States so as to become naturalized, or which determines whether he has entered the United States so as to be immune permanently from deportation to any country.

What should have continuing vitality is not an "encysted phrase" from *Kaplan v. Tod*, but its author's reliance upon unceasing critical analysis as a judicial tool rather than dogmatically-applied quotations. (Frankfurter, J. concurring in *Dennis v. United States*, 341 U.S. at 543).

An analysis of the decisions which petitioner has cited, for the reasons given above, does not bear out his contention that respondents are not "within the United States" within the meaning of Section 243(h).

IV

There Are No Policy Considerations Which Restrict Stays of Deportation on Grounds of Physical Persecution to Expelled Aliens Only.

Apart from the questions discussed above, two other observations made by the petitioner are of doubtful validity. He suggests (Gov't. 18-19), that there are "obvious reasons why Congress would make provision for withholding of deportation on the ground of persecution only to deportation (i.e. expulsion), not exclusion".

The first group, petitioner says, may "have resided in the United States for many years" and are therefore to be preferred to those who "merely seek to enter from a foreign country". The distinction which petitioner makes in his construction of the Act, of course, is not the number of years an alien has lived in the United States, but whether he is deportable in exclusion proceedings or in expulsion proceedings. Petitioner's construction of 243(h) would make the relief it affords available to the alien who had "illegally passed through our gates" (*Shaughnessy v. Mezei*, 212) and was subjected to deportation proceedings the day after his illegal entry, but deny the relief to Jew Sing, who had lived in the United States from 1921 to 1947, and who had served in the United States Armed Forces during World War II, merely because on his return to this country, after a five month trip abroad, he was ordered excluded. (See Transcript of Record in this Court, *Jew Sing v. Barber*, No. 18, October Term) (See also *Fon v. Rogers*, Civil Action 2179-54, United States District Court for the District of Columbia, further proceedings stayed by stipulation pending disposition of the case herein, which similarly involves a Chinese, excluded alien with long prior

residence in the United States and honorable wartime service in the United States Armed Forces.)

It can scarcely be maintained that it is "obvious" that Congress preferred expellable aliens to excluded aliens in view of the diverse situations of the aliens who come within the two categories.

The legislative history of section 243(h) does not support the Government's contention. When the Hobbs bill (H.R. 10, and S. 4037, 81st Congress) was before the Senate, Senator Graham of North Carolina called a subcommittee meeting to consider the question of deporting aliens to places where they might be persecuted. The hearings of this meeting have never been published. Congressman Hobbs and counsel herein, Jack Wasserman, were the only witnesses invited. Congressman Hobbs observed that there was no necessity to forbid deportation to a place of persecution since the Immigration Service had never attempted to deport under such circumstances.¹⁴ No distinction was made between excluded or expelled aliens. The subcommittee approved a statutory prohibition against such deportation in the belief that it was declaratory of existing immigration practices.

The second observation is that Section 243(h) is "not part of any long-established, well-recognized right of an alien, resident or non-resident". (Gov't 12)

Petitioner clearly misreads history.

The right of asylum has been granted from ancient times. It was an integral part of Talmudic law, as well as of the Greek, Roman and Canon law.¹⁵ Political writers in England and English courts have from time to time voiced the

¹⁴ See *U. S. ex rel. Weinberg v. Schlotsfeldt*, 26 F. Supp. 283 (D.C. N.D. Ill. 1938) where judicial intervention was required to prevent deportation of a Czech Jew to Nazi controlled Czechoslovakia.

¹⁵ Charles Recht, *The Right of Asylum*.

inviolability of the concept of asylum in English law. Chief Justice Campbell said of this right:

"It has been the glory of this country to afford it to the persecuted foreigner. That is the glory which I hope will ever belong to this country."¹⁶

Our Pilgrim Fathers, political and religious refugees, came to America in this tradition. In 1641 they wrote into the Body of Liberties of the Massachusetts Colony, the principle that people fleeing "from the tyranny or oppression of their persecutors * * * shall be entertained and speccored amongst us."¹⁷

George Washington in his Thanksgiving Proclamation in 1795, besought "blessings * * * to render this country more and more a safe and propitious asylum for the unfortunate of other countries."¹⁸ Every President from George Washington to Dwight D. Eisenhower has been confronted with some problem of granting asylum to political refugees.¹⁹

Generally, these problems have received sympathetic consideration. Outstanding have been the cases of French monarchists during Jefferson's administration; of Polish, German, and Irish refugees during Jackson's term of office; of German, Irish and Hungarian influxes during Polk's, Taylor's and Pierce's administrations, of Cubans during Grant's, of Austrian and Russian Jews during Theodore Roosevelt's two terms; of Germans and Austrians during Franklin Roosevelt's administration; of Oswego refugees,²⁰

¹⁶ *Regina v. Bernard*, 8 State Trials, N. S. 1055, 1061.

¹⁷ Charles Recht, *supra*, p. 16.

¹⁸ I Richardson's, Messages of the Presidents, 179-180.

¹⁹ See Frances Reinhold, *Exiles and Refugees in American History*, The Annals, May 1939.

²⁰ The Oswego refugees were brought here as parolees from Italy upon the order of the President dated June 9, 1944. See Hearings before the House Immigration Committee pursuant to H. Res. 52, 79th Cong. 1st Sess. June 25 and 26, 1945, p. 2.

Estonians²¹ and displaced persons during Truman's terms and of Hungarian refugees during Eisenhower's administration.²²

Our background is therefore rich in according asylum to aliens—even to parolees. We would never dream of executing these aliens while they remained on our shores: neither our conscience nor our laws would sanction such conduct. Should we close our eyes to their death by approving their transfer to communist hands? We submit that here, too, such action is not within the limits of our laws, our traditions, or our conscience.

V

Except for Yén Mok, the Respondents Are Governed by the Immigration Act of 1917 as Amended by the Internal Security Act of 1950.

Four of the respondents arrived in the United States prior to the effective date of the Immigration and Nationality Act of 1952. They were subject to exclusion proceedings under the Immigration Act of 1917. See 8 U.S.C. 1225. By operation of the savings clause in Section 405 of the 1952 Act, *supra*, the respondents therefore are subject to the deportation provisions of Sections 18 and 20 of the 1917 Act, 8 U.S.C. 154, 156. *United States v. Menasche*, 348 U.S. 528.

Inasmuch as they were not "immediately sent back", their deportation must be governed by the provisions of Section 23 of the Internal Security Act. *Chong v. McGrath*, *supra*. The language of that Act refers to deportation

²¹ In 1945 Estonian refugees from communism landed at Miami in frail vessels in which they crossed the ocean. We paroled them into the United States and refused to return them to the communists.

²² After the Hungarian revolt against communism of October, 1956, thousands of Hungarians fled their homeland. Thereafter, together with other United Nation's countries, we accepted some of these refugees as parolees.

of an alien under "any provisions of this Act", 64 Stat. 1010, 8 U.S.C. 156, rather than to the deportation of aliens "within the United States". Thus, even if the respondents be deemed "in legal contemplation" not within the United States, they are nonetheless aliens who are being "deported under . . . provisions of this Act".

Respondents believe that the statutory language clearly reaches them. But even if this is not so, the Government concedes that there is what it terms an "ambiguity" (Gov't. Brief p. 25) in view of the fact that the relevant term *chapter* (Act) in the earlier statute "included exclusion provisions as well as those pertaining to deportation proper" (i.e. expulsion).

Ambiguities in deportation statutes, as we have noted earlier, are resolved in favor of the alien. Certainly, this should be so when the issue is a stay of deportation to countries where physical persecution may ensue. *Fong Haw Tan v. Phelan, supra*.

VI

The Issue of Parole Is Not Before This Court

Respondent, Jimmie Quan, agrees with petitioner that the issue whether the allegation that the Attorney General refused to exercise discretion to continue his parole status is not before this Court, the matter not having been decided by the lower court or brought here. (Pet. 7).

Respondents welcome, however, the concession made by the Solicitor General, and made for the first time in this Court, that they are entitled to the exercise of the Attorney General's discretion under Section 212(d)(5). But they dispute the implication that their applications for parole upon the ground of physical persecution, have had the benefit of his exercise of discretion. (Pet. 5, 6), or that Jimmie Quan's complaint has been "cured". (Pet. 7)

Although opportunity to file the parole applications upon the ground of physical persecution was afforded the respondents for the first time after their cases were brought to this Court, neither hearings nor interviews were granted them, and the denials of their applications were made simultaneously by the District Directors, in whom the regulations reposed the authority to act, in San Francisco and in New York without stated reasons given.

In addition, it should be noted that Chinese nationals who are in like circumstances, except for the fact that they have been ordered expelled from the United States rather than excluded, have as a matter of policy been granted stays of deportation "pending receipt of official information" regarding the nature of physical persecution in Communist China.²³ See Matter of Lee Sung, A-7921505, reproduced Petitioner's Brief, companion case of *Leng Ma May, v. Barbo*, No. 105, October Term, p. 18. Nothing appears to justify the distinction in treatment between the respondents' applications for parole and the applications of expelled aliens for stays of deportation.²⁴

²³ Note should be made of the criticism of Immigration practices by the House Immigration Committee which reported: "It is feared that application for 'withholding of deportation' was denied in many cases where threat of physical persecution in the country to which the deportee is destined may have been claimed with a reasonable degree of probability: . . .

There seems to be no set policy covering the exercise of discretionary power vested by the law in the Attorney General, yet delegated by him to lower grade officers of the Immigration and Naturalization Service, who do not appear to be properly educated and trained to judge the difficult and involved element entering into the cases before them under the said section." *Report on the Administration of the Immigration and Nationality Act*, House Judiciary Committee (1955) p. 69.

²⁴ The Commissioner of the Immigration and Naturalization Service informed the House Appropriations Committee (Hearings, 85th Cong. 1st Sess. Department of Justice Appropriations, pp. 172-3):

"We have held off further deportation of these two races (Chinese and Yugoslavs) until July 1, because we are receiving a great deal

Moreover, it should be noted that although the Solicitor General has conceded here that 212(d)(5) parole relief is available for excluded aliens whose deportation would result in physical persecution, the petitioner has not yet adopted the Solicitor General's position as a policy in any of the cases pending in the lower courts. Respondents' present counsel represent approximately 30 other Chinese aliens who are in like position, none of whom have been permitted the opportunity to submit applications for parole. Their cases are pending in the United States District Court for the District of Columbia, awaiting the outcome of the present case. See *Wong Fong et al v. Rogers*, *supra*; *Hon Doh Toy et al v. Rogers*, C.A. 3729-54; *Lee Hong Dick et al v. Rogers*, C.A. 5653-55; *Chiu Yuan Ming v. Rogers*, (C.A. 668-56; *Leong Bing Ling v. Rogers*, C.A. 336-57; *Wong Bing et al v. Rogers*, C.A. 2420-57; and *Cheung Yau v. Rogers*, C.A. 37-56.

The alleged consideration of the respondents' request for continuation of parole can, in view of the issues here and the record below, have no bearing on the question before this Court.

of very bad reaction from the public assuming that we are sending these people over there to be persecuted".

If the basis for the exercise of discretion is "the very bad reaction from the public", there is no distinction at all between the excludable aliens who have sought continuation of parole, and the expellable aliens who have obtained stays of deportation.

Conclusion

For the reasons set forth, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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CITY OF WASHINGTON,

District of Columbia, ss:

AFFIDAVIT

I, FRANK H. PARTRIDGE, Assistant Commissioner, Enforcement Division, Immigration and Naturalization Service, United States Department of Justice, being duly sworn, depose and say:

That the procedure for effecting deportation to the mainland of China is as follows:

1. After an order of deportation has become final and a determination has been made that China is the country to which the alien shall be deported, the alien is so notified by service upon him of Form I-294, which reads substantially as follows:

NOTICE TO ALIEN OF COUNTRY TO WHICH HIS DEPORTATION HAS BEEN DIRECTED

File No.:

Date:

Pursuant to the order of deportation, in your case and Section 243 of the Immigration and Nationality Act, your deportation to China has been directed.

Very truly yours,

2. A Certificate of Identity to facilitate the alien's transportation to China via Hong Kong is prepared, containing a photograph of the alien, which certificate reads substantially as follows:

CERTIFICATE OF IDENTITY

To facilitate transportation to China via Hong Kong of applicant whose photograph appears below.

NAME:

DATE AND PLACE OF BIRTH:

NATIONALITY:

SEX:

OCCUPATION OR PROFESSION:

MARITAL STATUS:

PRESENT ADDRESS:

PURPOSE OF JOURNEY: For travel to Hong Kong in transit to China. A national passport or any form of travel document cannot be obtained for travel to China

Photograph
of
Applicant

3. The Service then requests the appropriate British Visa Officer for the United States at New York, N. Y., to issue the necessary transit facilities for deportation of the alien to Hong Kong, accompanying the request with a copy of the Certificate of Identity. The request is referred to the appropriate British authorities in Hong Kong and, if approved, the British Visa Officer notifies the Service substantially as follows:

In this connection, we now have pleasure in advising you that we have been authorized to grant him direct transit facilities for Hong Kong enroute to China provided that he travels in an organized American President Lines group movement.

4. When transportation arrangements have been completed, the British Visa Officer endorses the Certificate of Identity by placing thereon a Hong Kong Transit Visa and returns the Certificate of Identity to the Service. The Certificate of Identity is then delivered to the escort officer assigned to accompany the alien to Hong Kong.

5. The alien is taken into custody and transported to Hong Kong, B.C.C., via American President Lines vessel. Upon arrival, he is escorted to the Kowloon Railroad Dock where he boards a train for Lo Wu. The alien leaves the train at Lo Wu and proceeds on foot across Freedom Bridge into the China mainland.

6. In May 1953, this Service entered into an agreement with the British authorities at Hong Kong and the transportation line under which any alien deportee to the mainland of China who is refused admission into China may be returned to the United States. Pursuant thereto, 235 deportations have been effected through the port of San Francisco and all deportees have been accepted by China.

FRANK H. PARTIDGE,

CITY OF WASHINGTON,

District of Columbia, ss:

Subscribed and sworn to before me this 31st day of January, A.D., 1958.

CHAS. E. ALLEN,

Notary Public.

My Commission Expires August 14, 1960.

(2717)